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Transformations of European Welfare States and Social Rights

Regulation, Professionals, and Citizens

Edited by
Stine Piilgaard Porner Nielsen · Ole Hammerslev

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Editors

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palgrave
macmillan

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ISSN 2947-9274 ISSN 2947-9282 (electronic)
Palgrave Socio-Legal Studies
ISBN 978-3-031-46636-6 ISBN 978-3-031-46637-3 (eBook)
https://doi.org/10.1007/978-3-031-46637-3

Cover illustration: agefotostock/Alamy Stock Photo

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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Preface

The motivation for putting this anthology together was sparked during our work on the research project, FRAMLAW, funded by the Independent Research Fund Denmark. FRAMLAW analysed access to social rights for young persons experiencing homelessness in the context of the Danish welfare state and their encounters with welfare professionals. In our work, we followed and interviewed young persons in homelessness and welfare professionals to analyse how the young persons mobilised their social rights and how the welfare professionals transformed social law and policy aims into practices through performance of discretion. Following this analytical work, we identified the Danish welfare state's reliance on third sector organisations' delivery of welfare support and the complexity of welfare state organisation and of welfare law for welfare professionals as well as for the young persons in homelessness. Moreover, the organisational, financial and political work context of the welfare professionals shape encounters between them and citizens during which social needs are identified as the basis for formulating adequate solutions to citizens' social problems. In addition, citizens' access to social rights are significant for the likelihood of improving their social situation and mitigating social exclusion. Such processes are to a large extent influenced by the individual citizen's knowledge of social rights, perception of self as eligible for welfare support and ability to manage systemic demands pertaining to welfare bureaucracy.

We wanted to examine these dynamics in depths and we therefore invited leading European scholars to participate in a workshop at University of

Southern Denmark in January 2023 to explore welfare rights in practice. The workshop took place at this University as both editors were affiliated with the institution during the FRAMLAW project. This book is the result of that workshop. The contributions are divided into three interconnected levels to offer in-depth analytical insights into the relevance of macro-, meso- and micro levels for European welfare rights in practice.

We want to thank all the contributors for their lively and engaging debates at the workshop, for keeping deadlines and for participating to the book. We thank the team at Palgrave Macmillan for their great work and timely and invaluable support.

Aalborg, Denmark — Stine Piilgaard Porner Nielsen
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May 2023

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1

Introduction: Transformations of European Welfare States and Social Rights

Stine Piilgaard Porner Nielsen and Ole Hammerslev

Analysing the Role of Welfare Rights

'The rights of man. What are they?' asked the political thinker Hannah Arendt (1951) in her analysis of the United Nations Human Rights Declaration of 1948. Questions related to the character, significance and mobilisation of rights are central in research concerned with law and society analyses,[1]

[1] To offer some suggestions, which are by no means exhaustive, of relevant literature on law, society and rights, Zemans (1982) and Genn (1999), for example, study persons' mobilisation of rights as they identify and analyse structural and individual factors that may influence legal mobilisation processes. Felstiner et al. (1981) and Sandefur (2019) examine transformations of social problems into legal problems and the role of intermediaries, e.g., legal aid providers, for such processes. Ewick and Silbey (1998) examine the perception and experience of law and legal institutions by ordinary persons in the context of their everyday life, arguing that these factors influence individuals' understandings of rights and access to same. Sommerlad (2004) and Nielsen and Hammerslev (2022) analyse the significance of third-sector expert actors for facilitating citizens' access to rights and justice which, they argue, has increased caused by neo-liberal welfare reforms and digitalisation processes.

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_1

and in this anthology, too. The purpose of the anthology is to examine social rights regulation and access to these in European welfare state contexts.

In this anthology, the welfare state is coined as the state which is responsible for transforming welfare rights into practice. Thus, there are different welfare state contexts, depending on the state in play. In this anthology, contributions concern the Dutch, British, Swiss, Swedish, Norwegian, Danish and Finnish welfare states. These spatial differences are of analytical relevance as they illustrate variations in welfare states' organisation of social rights, for example through the formulation of welfare rights eligibility criteria and discourses concerning deservingness which may permeate organisational and welfare professionals' interpretations of social support needs. A common denominator between the European welfare states analysed in this anthology is their reliance on framework law for the regulation of social rights. Framework law structures aims, purposes and processes yet delegates authority whereby the realisation of these aspects, to a large extent, is not solely of state concern; instead, it is often a municipal or regional responsibility, and in some cases, it also extends to third sector actors, such as NGOs, and private actors. Law's delegation of responsibility constitutes relations of interdependence and cooperation between the actors whereby state actors, for example, depend on cooperation with third sector actors to provide sufficient social support. Vice versa, NGOs and voluntary organisations may depend on state institutions for funding and information flow which shape their scope for practice, as also illustrated in several of the anthology's contributions.

Changes characterise the European welfare states of today. Neo-liberal reforms cause state transformation processes, resulting in reconfigurations of welfare state institutions and actors. Third sector initiatives and actors may take over where welfare professionals fall short due to cuts in resources or changing political paradigms. New actors entering the welfare states' playing field may, for better or for worse, influence access to rights and individuals' legal mobilisation processes. Welfare institutions may be replaced or complemented by voluntary sector actors operating on other financial and regulatory foundations than that of the state institutions which, in different ways, influence their ability to offer adequate support. Welfare state reconfigurations and transformation may cause changes on a structural level as a result of institutional austerity. They may, too, result in changes in criteria of welfare support eligibility which influence discussions on deservingness as identified in the literature on transformations related to 'from welfare to workfare' discussions (see, e.g., Eleveld et al., 2020). Such changes have real effect, not only on a structural level but also on a meso level, that is, in the encounters between citizens and welfare professionals where citizens' needs

are assessed and decisions on social support are made. Though encounters between these actors may be pivotal for the transformation of social rights into practice, it is not a given that these encounters take place. Barriers to encounters between individuals and intermediaries may be lack of awareness of rights and of perceiving oneself as rights holder, lack of trust and structural inaccessibility to expert advice (Genn, 1999; Nielsen & Hammerslev, 2022).

On European level, social rights are, on paper, increasingly gaining territory, manifested with the 2017 proclamation of the European Pillar of Social Rights with its three chapters, outlining 20 principles to support EU citizens' social inclusion and equality. The principles focus on the right to social support of, inter alia, unemployed persons and persons in homelessness to mitigate social exclusion that may follow from these social situations. The Pillar stresses that:

> Delivering on the European Pillar of Social Rights is a shared political commitment and responsibility. The European Pillar of Social Rights should be implemented at both Union level and Member State level within their respective competences, taking due account of different socio-economic environments and the diversity of national systems, including the role of social partners. (European Pillar on Social Rights, 2017, pp. preamble, no. 17)

The Pillar thus emphasises the relevance of both the Union and each Member State for implementing EU citizens' social rights and transforming them into practice, reflecting that authority and responsibility to perform discretion on citizens' access to social rights to a large extent are outsourced to Member State level (Westerman, 2018). Moreover, the Pillar's 20 principles are generally characterised by broad formulations, inviting for interpretation. To offer an example, Principle 4 on active support to employment states that:

> Everyone has the right to timely and tailor-made assistance to improve employment or self-employment prospects. This includes the right to receive support for job search, training and re-qualification. Everyone has the right to transfer social protection and training entitlements during professional transitions. (European Pillar on Social Rights, 2017, p. Prinicple 4)

With this formulation, Principle 4 stresses the increased focus on EU citizens' social rights whereby the EU sets a direction for Member State practices in this field, formulating aims and purposes on EU as well as Member State level (Manners, 2008). Yet the Principle does not formulate details for processes whereby it leaves room for performance of discretion on state as well as local level. With its formulation of aims and purposes, EU social

rights policies and regulation take on a framework character within which Member States target their practices whereby the actual implementation and transformation of EU rights into practice is a state concern, stressing the relevance of analysing the state as actor in transforming rights into practice (Westerman, 2018). An increased *on paper*-focus on EU social rights is significant for EU citizens' potential access to social support from their respective welfare states. Yet, rights on papers do not by default translate into practice. As Pound (1910) pointed to, gaps between law in books and law in action may persist. From socio-legal perspectives, these gaps are essential objects for study to identify the relevance of rights and their transformation into practice. These gaps may be shaped by structural as well as individual factors, influencing, unequally, different societal groups' access to welfare rights.

In this anthology, the formulation and relevance of social rights are analysed and discussed, drawing on a variety of cases and countries. The words 'social rights' and 'welfare rights' are used interchangeably throughout the anthology and refer to rights regulated by welfare states with the purpose of supporting citizens' social inclusion. To offer some examples, social security, employment training and temporary housing are welfare rights that are regulated on state level and accessible for eligible persons with the purpose of mitigating social exclusion that may follow from, for example, long-term unemployment or lack fo housing. The anthology examines transformations of European welfare states and social rights, and the significance of such transformations for encounters between welfare professionals and citizens and for citizens' access to social rights.

The anthology differs from existing literature in the field of welfare studies which, for example, examines the political organisation of welfare states (Esping-Andersen, 1990) or more recent welfare state studies that analyse the development of welfare markets (Ledoux et al., 2021) or the significance of political discourses for welfare state changes (Kissova, 2021). Also, of more recent character are Cowan and Mumford (2021) and Edmiston et al. (2022) and Eleveld et al. (2020). The former two examine regulation of welfare rights during the COVID-19 pandemic and citizens' experiences hereof whereby they offer detailed analyses of state regulation and (non-) state actors and citizen encounters in the time of the pandemic. The latter zooms in on transformations in state regulation of welfare rights related to unemployment, offering detailed analyses on welfare state transformations as they are reflected in activation schemes and social security reforms. In this anthology, the contributions' focus exceeds time, space and social situations whereby they in their own right and for the anthology as a whole offer analytical

insights into welfare state transformations and social rights which transcend such spatial and temporal divides.

The Macro Level of State Regulation

From a macro level perspective on state regulation, the anthology offers insights into, inter alia, the relevance of law for the formulation and transformation of social rights, neo-liberal reforms' significance for changes in state reconfiguration and regulation and into non-state actors' role and responsibility for putting welfare state services into practice. On the macro level of state regulation, social law is to a large extent characterised by framework law with vague definitions and preambles (Sand, 1996, 2005; Teubner, 1986, 1987; Zacher, 1987). The language of welfare law may lead to challenges in interpreting individuals' legal status and predicting the outcome of legal processes (Lemann Kristiansen, 2022; Rønning & Hammerslev, 2018), and these challenges may be further enhanced with framework law allowing for welfare professionals' performance of discretion, influenced by factors as institutional and professional logics and organisational, economic and social contexts (Lipsky, 1980; Mik-Meyer & Silverman, 2019; Sommerlad, 2004).

A general character of framework law is the outsourcing of law through the delegation of authority. This is, too, identified on EU level where some social rights, such as the authority to regulate the right to housing, are delegated to Member State level, following the principle of subsidiarity. As illustrated in the anthology, European institutions may be crucial actors for forcing states to deliver on social rights that citizens are entitled to (see Chapter 2 by Eule). Welfare law's aim and purpose may shift over time, depending on policy goals and dominating discourses. This is examined in the anthology with contributions that analyse the relevance of deservingness for welfare eligibility, changes in welfare law's aims and purposes and offer insights into third sector actors' role in offering social support in welfare state contexts where the public sector due to neo-liberal reforms faces difficulties in supplying adequate services and help. As with some European institutions, third sector actors may, too, be decisive for transforming welfare states' responsibility into practices. This may be the result of neo-liberal reforms which relocate resources and leave public sector actors in a limited position for offering social support. In such cases, voluntary and third sector actors may take over, as illustrated in the anthology's Chapter 4, written by Olesen, Helminen and Bäcklin.

The Meso Level of Welfare Professional-Citizen Encounters

When citizens experience social problems, their processes of mobilising law to mitigate their problems are to a large extent influenced by their resources, both their own and others such as social network which they may rely on for advice and expertise support (Nielsen & Hammerslev, 2022). Often, their mobilisation of rights calls for interactions with welfare professionals who as street-level bureaucrats may be in positions to transform welfare rights into practice (de Winter & Hertogh, 2020; Lipsky, 1980). This stresses the relevance of interactional and relational aspects such as encounters between welfare professionals and welfare recipients and both actors' perceptions of legitimacy and law. Framework law's character invites for taking extra-legal factors into consideration in welfare professionals-citizen encounters, and existing studies illustrate that framework law may indeed offer flexibility for the performance of discretion, allowing to consider the individual situation of the citizens (Lemann Kristiansen, 2022; Dalberg-Larsen, 2005). Yet, framework law may also challenge citizens' ability to predict their legal status which potentially has a negative impact on these encounters. In welfare encounters, welfare professionals map out citizens' situations in order to identify and categorise social problems and depending on their assessment decide whether citizens are eligible for social support (Danneris & Herup Nielsen, 2018; Nielsen, 2020). Categorising citizens' need for social support is both influenced by the options for welfare support and regulated by welfare law. Here, changing legal categories and knowledge production processes related to the understanding of each individuals' situation may influence practices and outcomes pertaining to individuals' access to welfare support and rights (see Chapter 7 by Joormann). These knowledge production processes may be influenced by understandings of deservingness, constructed by professionals as well as the individual citizens, ultimately informing their encounters.

From the perspective of encounters between welfare professionals and citizens, contributions in the anthology analyse interactions between professionals and citizens, related to, for example, dynamics in encounters in the legal context of the welfare state and to professionals' and citizens' knowledge exchange, categorisation and negotiation of social problems and possible solutions. The contributions illustrate how national as well as local organisational contexts shape actors' scope for practice and their subjective perceptions of legitimate practices in the given situations and encounters.

The Micro Level of Mobilising Social Rights

Individuals who experience, for example, unemployment or homelessness may be eligible for welfare support. To initiate a process of welfare support, citizens must be able to categorise their situation as problematic and possible to address under the auspices of the welfare state. This requires an understanding of both one's problems as potentially justiciable and the welfare bureaucracy as potential entry point for support (Bourdieu, 2016). The processes of categorising problems and facilitating contact to the municipal authorities demand resources as, for example, awareness of social rights and the ability to navigate in the institutional set-up of the welfare state (Felstiner et al., 1981; Genn, 1999; Hertogh, 2018; Olesen & Hammerslev, 2023). In a framework law context, it may, as mentioned, be challenging for citizens to predict their legal status, and such interpretive processes may be negatively influenced by framework law's vague formulation and broad definitions. Existing empirical studies illustrate how these processes may cause frustration and sense of alienation from the welfare state, jeopardising citizens' legal mobilisation processes and thus hindering paths to rights (see, e.g., Cowan, 2004; Nielsen & Hammerslev, 2022; Sarat, 1990). In the anthology, contributions examine how welfare state categories of deservingness influence understandings of individuals' situation, ultimately affecting the interpretation of their situation as justiciable or not. Moreover, contributions analyse individuals' resources and relevance of social network for mobilising welfare rights to stabilise their social situation and thereby mitigate social exclusion.

Outline

The anthology is based on a tripartite structure. Following the introduction, Chapters 2–4 constitute the first section which concerns **State regulation, transformation of state regulation and agents acting on behalf of the state**, and the chapters analyse state regulation related to social rights and the relevance of non-state actors, following transformations in state regulation.

Chapter 2, *Claim and Blame—How Welfare Law Institutionalises Deservingness* by Tobias Eule, offers analytical insights into the relevance of socio-legal history of welfare institutions for the development of regulation of social rights, emphasising the significance of 'deservingness' as an increasingly pivotal criterion for eligibility. The chapter examines the development of welfare conditionality and discusses aspects of eligibility concerns in relation to limitations of welfare universalism. The chapter thus contributes to

the anthology with insights into European welfare rights' development and welfare state regulation hereof. It concretises its findings through the introduction of the case of Beeler v Switzerland which concerns Mr. Beeler's access to social rights and denial of same by the Swiss state. In that case, the grand chamber of the European Court of Human Rights decided that Mr. Beeler's right to family and to discrimination prohibition had been violated by the Swiss authorities. The case illustrates different constructions of deservingness between state level and European level, which have real effect on citizen level. Thus, the chapter offers analytical insights to the relevance of context for interpretation and application of social rights on macro level.

Chapter 3, *What Is the Function of Welfare Law today? Consequences of the Work-Line Policy* by Inger-Johanne Sand, examines developments in welfare rights with a specific focus on rights to benefits and services for persons in unemployment. Drawing on current neo-liberal reforms in the Norwegian welfare state, Sand contextualises the analysis of social rights' functions in a contemporary welfare state perspective. She thus addresses welfare transformation of general concern to European welfare states where public service expenditures are sought decreased through such reforms which potentially causes dilemmas related to the welfare state's obligation of providing social support and protection to eligible citizens. The chapter identifies an increased political and legislative focus of a so-called work-line character, indicating a political prioritisation of workfare over welfare while discursively framing activation schemes and labour market integration as socially integrative mechanisms, supporting a 'meaningful' life for the welfare recipients. With this focus, the chapter contributes to the anthology by offering insights into relations between societal changes and welfare state regulation.

Chapter 4, *The Penal Voluntary Sector's Role in the Nordic Welfare States: A Shadow State?* by Annette Olesen, Maija Helminen and Emy Bäcklin, analyses the role of third sector actors in welfare state service supply. The chapter focuses on the role of penal voluntary sector organisations for transforming public sector responsibility of prisoner rehabilitation and reintegration into practice. The chapter contributes to the anthology with its specific focus on third sector actors' relevance for welfare state regulation—an aspect of increased relevance, following welfare cuts and neo-liberal reforms which challenge public sector actors' performances. The authors suggest that neo-liberal reforms in the Nordic prison and probation services have led to the voluntary sector becoming increasingly important in providing support to prisoners and released prisoners. Drawing on empirical findings from the Danish, Finnish and Swedish welfare states, the chapter illustrates third sector actors' relevance as well as the difficulties they face in transforming welfare

services into practice. In their contribution, the authors illustrate the paradoxes that third sector actors encounter in providing welfare services, their economically vulnerable position, and how they in the 'shadow of the state' act to fill out the gaps that follow from neo-liberal reforms.

Chapters 5–7 constitute the section **Encounters between welfare professionals and citizens** examining, on a meso level, the significance of encounters between citizens and welfare professionals for the former's access to social rights.

In Chapter 5, *A Double Helix: The Intertwined History of the Marginalisation of Welfare Clients and Their Activist Lawyers and Advisers in the Transformation of the Welfare State in England and Wales*, Pete Sanderson and Hilary Sommerlad trace transformations in the UK of neo-liberal reforms' reconfigurations of social citizenship, and the relevance of these transformations for the scope of practice available for welfare professionals in their encounters with citizens. Through interviews with legal aid providers and lawyers, the chapter illustrates how especially marginalised citizens' access to rights are challenged as working conditions of these welfare professionals are deteriorating. Reasons for this deterioration are many-folded, and the authors point to, for example, temporal aspects, such as limited time to meet with the citizens, listen to their stories and create a space for providing adequate legal aid. Welfare professionals experience that these encounters suffer from inadequate resources which not only cause difficulties for citizens in accessing rights but also clash with the welfare professionals' subjective understandings of their work's purpose.

Chapter 6, *The Paradoxical Reality of Welfare Professionals: Encounters Between Welfare Professionals and Citizens Within Social Security in the Netherlands* by Paulien de Winter, analyses the relevance of welfare professionals-citizens encounters for welfare professionals' interpretation and application of rules. The chapter contributes to the anthology with its interactional focus that illustrates encounters' significance for welfare professionals' performance of discretion. The analysis is situated in the context of the Dutch welfare state, more specifically in a Dutch social security context, and the chapter outlines how national legislation offers a framework for welfare professionals' practices. Within this framework and with consideration to respective policies and guidelines regulating their agency in bureaucratic contexts, welfare professionals perform discretion. In doing so, they draw on their knowledge of rules and interpretation of citizens' situations whereby relational, interactional and organisational aspects become central for the practice of performance in welfare state bureaucracy. Through its empirically based analyses, the chapter

illustrates how welfare professionals' understandings of rules and regulations and perceptions of the welfare clients' situations may influence their interpretation and application of rules in these encounters.

Chapter 7, *Asylum Case Adjudication in Sweden, Country of Origin Information and Epistemic Violence* by Martin Joormann, offers analytical insights into practices in the Swedish welfare state related to the granting of the right to asylum. The chapter contributes to the anthology with its analysis of how the process of knowledge production is relevant for welfare professionals' decision-making performance. Drawing on interviews with migration court judges, Joormann unfolds the practice performances of these decision-makers in the Swedish welfare state. The chapter illustrates the significance of country origin information (COI) for judges' assessment of eligibility and deservingness, and the chapter problematises the construction of knowledge reflected in the COI. Joormann examines the relevance of judges and courts for the reproduction of institutionalised power imbalances, and the chapter contributes to the anthology with its illustrations and discussions of the relevance of interactional aspects between judges' construction and application of legitimate knowledge and processes of assessing eligibility and deservingness related to access to rights.

Chapters 8–10 constitute the section **Citizens' mobilisation of social rights** in which the contributions examine the micro level of individuals' access to social rights. Applying different perspectives to this focus, the chapters illustrate obstacles and opportunities that may influence individuals' processes of mobilising law and social rights.

In Chapter 8, *Access to Justice and Social Rights for Victims of Trafficking and Labour Exploitation in Sweden*, Isabel Schoultz and Polina Smiragina-Ingelström analyse the relevance of European and Swedish law for victims' access to rights. The chapter focuses on victims of trafficking and labour exploitation, and it takes into consideration the role of international and national legal frameworks and policies for victims' opportunities for access to support in the context of the Swedish welfare state. The chapter draws on interviews with welfare professionals and victims to illustrate the actors' legal mobilisation processes, and it illustrates the essential significance of the processes of identifying persons as victims for persons' access to social rights and support. The chapter, too, examines the role of both non-state and state actors for individuals' legal mobilisation processes as experienced through these actors and the victims. Through these analyses, the chapter contributes to the anthology as it situates legal mobilisation processes in the context of the

Swedish welfare state, taking law's formulation and the welfare state organisation into account for understanding individual persons' access to social rights and to justice.

In Chapter 9, *Welfare Clients' Relational Legal Consciousness: An Empirical Perspective from the Netherlands*, Marc Hertogh analyses welfare clients' perceptions of welfare law's legitimacy with a starting point in the case of the Netherlands as a 'punitive welfare state'. Hertogh argues that welfare state transformations and legislative changes in the Netherlands, as well as in most other European welfare states, have led to a punitive form of welfare state regulation with an increased focus on sanctions and strict obligations targeted welfare recipients. Drawing on survey results, the chapter illustrates how welfare clients' perceptions of law and of welfare professionals' application of rules influence their understandings of legitimate practices. There is thus a strong relational focus in the chapter which centralises the interactional character of welfare bureaucracy, yet with an analytical starting point in the perspectives of the welfare clients. The chapter contributes to the anthology as it illustrates clients' understandings and perceptions of access to social rights in the context of strict social rights regulation which reflects the regulatory reality of many European welfare states.

In Chapter 10, *Youth Homelessness in the Danish Welfare State: How do Young Persons in Homelessness Mobilise Rights?*, Stine Piilgaard Porner Nielsen and Ole Hammerslev analyse the paths pursued to mobilise social rights by young persons experiencing homelessness. The chapter contributes to the anthology as it examines processes of accessing social rights as these are experienced by this specific group of socially marginalised citizens. Drawing on interviews with young persons in homelessness, the chapter illustrates how the respondents' perceptions and experiences of their situation and of the welfare state bureaucracy influence their legal mobilisation processes. The chapter suggests that these processes to a large extent are influenced by the respondents' awareness of rights, social network and sense of the welfare system. These three factors may, in varying degree, influence the young persons' agency which stresses the subjective and dynamic character of legal mobilisation processes. Moreover, the chapter stresses the role of intermediaries, especially for persons who display a more passive agency, as intermediaries are in a position to translate the social situation of individuals into the context of the welfare systemic bureaucracy based on which legal mobilisation processes may be initiated and facilitated.

Chapter 11, *Conclusion: Transformations of European Welfare States and Social Rights*, by Stine Piilgaard Porner Nielsen and Ole Hammerslev,

concludes the anthology by drawing on the contributions' diverse analyses of transformations of welfare states and of social rights from the macro-perspective of state transformations and reconfigurations, the meso-perspective of public encounters between welfare professionals and citizens, and the micro perspective of individuals' access to social rights. This concluding chapter sums up on the findings and contributions throughout the anthology, and it stresses the link between the three levels. Moreover, it identifies and unfolds common factors across the three levels which weave the chapters together and manifest that analysing welfare state transformations and social rights calls for research that, from different methodological and contextual starting points, manages to grasp the complexity of European welfare state transformation and social rights of today.

With this diverse set of contributions, the anthology offers its readers insights into, firstly, the development and relevance of welfare state regulation, secondly, the significance of encounters of various characters for welfare professionals' performance of discretion which has real effect for the citizen, and, thirdly, citizen perspectives on the relevance of law and welfare bureaucracy which ultimately influence their legal mobilisation processes and thus the transforming of social rights into practice in the context of European welfare states.

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Part I

State Regulation, Transformation of State Regulation, and Agents Acting on Behalf of the State

2

Claim and Blame: How Welfare Law institutionalises Deservingness

Tobias Eule

Introduction

Within the subfield of 'gap studies' in the sociology of law,[1] the implementation of social rights arguably takes up an extreme position. While social rights including the right to work, the right to education and the right to health were already recognised in the Universal Declaration of Human Rights (UDHR) in 1948, their translation into enforceable doctrine and subsequent application have been uneven at best (Jensen & Walton, 2022). Beyond mapping these differences in broad strokes (Esping-Andersen, 1998), the focus of empirical investigations has been the analysis of specific instruments (e.g. targeting work, housing, education or health) in specific (local, municipal, state) contexts and stressed the importance of street-level practices, often echoing the seminal work of Michal Lipsky (1980). In this, the socio-legal examination of social rights[2] in practice is virtually inseparable from debates

[1] For the sake of this article, socio-legal, sociology of law and law and society approaches are treated as one (diverse) field, and the terms are used interchangeably.

[2] Here understood as entitlements and protections that individuals and communities have in relation to economic or societal goods and services, including education, health care, social security, housing, and employment.

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_2

in public administration and social policy, and indeed, the intertwined fields have produced valuable insights into the implementation of 'social rights as welfare law' in national and subnational contexts. At least since Aubert et. al.'s seminal work on the Norwegian Housemaid Act (Aubert, 1966; Aubert et al., 1952), scholars have generally tried to explain the 'gap' between law 'in the books' and law 'in action' not only by comparing expectation and reality, but by examining what happens within this 'gap' (Gould & Barclay, 2012; Nelken, 1981; Rosenberger & Küffner, 2016; Sarat, 1985). This includes the interaction (or, more often non-interaction) of welfare services (Bjerge et al., 2018; Forbess & James, 2014; James & Killick, 2012) and their reliance on brokerage and advice (Garay et al., 2020; Koch & James, 2022; Koch, 2018; Kulmala & Tarasenko, 2016; Small & Gose, 2020) in navigating the welfare state. With regard to decision-makers, many scholars move beyond the measurement of discretion and highlight the importance of concepts of deservingness that structures decisions (Chauvin & Garcés-Mascareñas, 2014; Heuer & Zimmermann, 2020; Oorschot, 2000; for a recent overview, see Ratzmann & Sahraoui, 2021).

While originally based on survey-based research, deservingness has become a useful heuristic in many examinations of public administration, as it captures the social legitimacy of claiming social rights (Oorschot et al., 2017). As such, they narratively anchor and justify the sharp categorisations between claimants and those not eligible for welfare—they justify who can claim rights, support and assistances, and who is to blame for their situation themselves. Deservingness conceptualisations explain why eligibility rules to specific programs still regularly filter wide access to social rights (Janssens & Van Mechelen, 2022). So far, the concept has mostly been applied as heuristic to explain the individual behaviour of policy-makers or street-level bureaucrats. In this paper, I argue that deservingness conceptualisations are enshrined in and live beyond social law that sets up welfare institutions and programs. More so than the letter of the law, the justification for targeting some, but not all in precarious situations takes on a social life of its own and informs the 'culture' of organisations as much as the individual decision-making of state officials.

This chapter argues that particularly within the field of welfare law, we have overstated the novelty of welfare conditionality as a specifically neoliberal form of welfare provision and overseen historical parallels as well as other forms of limiting access to welfare. The critique offered here is simple—simplistic even!—and applies to the author as much as any other colleague in the field: When studying the implementation of law, we place too much emphasis on the doctrine, narratives and debates on legal change, innovation

or reform and ignore the legal origins of persisting practices, understandings and tales. However motivated, this presentism is holding the sociology of law back from realising its full potential as alternative to public administration or social policy. As a result, we are failing to tap into the full potential of socio-legal analysis that includes a historical contextualisation of implementation.

The case made here is to play to the strengths of socio-legal approaches. While the usefulness of macro level welfare system-type comparisons has long been questioned, so have approaches that individualise policy application to the atomised discretionary decisions of street-level bureaucrats. More integrated meso level approaches—including those of this author (Eule et al., 2018)—tend to follow a Lipskian analysis of public administration in which the rhetoric, mechanisms and logics of novel legislation are analysed in context with organisational customs, habits or cultures (Lipsky, 1980). In my own work, I have shown how migration officials in Germany struggled to incorporate new legislation that focused on integration requirements in order to activate migrant participation in German society with their established ways of working and understanding of migration control (Eule, 2014, Chapter 3). Here, officials rejected more neo-liberal policies because they saw immigrants as cases or subjects and not clients. However, what I failed to make plain was how this 'organisational culture' was in many ways merely an institutionalisation of previous iteration of migration law. From the first iteration as *Ausländerpolizeiverorndung* (ordinance on the foreigners' police) in 1938 up to 2003, migration law had been part of administrative police law (*Polizei- und Ordnungsrecht*) that focuses on local hazard prevention (*Gefahrenabwehr*) and systematically hindered long-term residence and naturalisation (Eule, 2014; Groß, 2004). Officials resisted integration policies not because they were anti-immigration, but because they could not fathom that migration law was about integration.

This chapter calls for socio-legal approaches on law in practice not to replace the 'black box' of implementation with the 'black box' of organisational culture, but rather, to take the (socio-) legal history of institutions seriously. It argues for applying the analytical tools on novel legislation—which examines its content and mechanisms as well as its narratives and underlying assumptions of human behaviour—to existing laws and policies. This is particularly relevant to the analysis of welfare law, as institutions delivering social support were for the most part created through welfare law and did not precede it.

To illustrate the argument, the chapter will (1) point to the ubiquity of deservingness considerations that underlie welfare conditionality. However,

rather than a neo-liberal phenomenon, it (2) argues that all welfare policies (or indeed all law, cf. Janger & Block-Lieb, 2006) have certain underlying assumptions about human behaviour that structure eligibility mechanisms. By (3) examining the recent ECtHR decisions on Beeler v Switzerland, it will show the explanatory potential of historical contextualisations of welfare law for the analysis of policy implementation.

Social Rights in Action: The Rise and Rise of Welfare Conditionality

While the development of the modern welfare state can be traced back to the nineteenth century, the history of promulgating and implementing social rights in Europe is usually seen to begin with the adoption of the European Convention on Human Rights (ECHR) in 1950, which included a number of social rights provisions, such as the right to education (Article 2, Protocol 1) and the right to social security (Article 14). However, given the immensely differing political opinions and welfare state structures in Europe, it is unsurprising that these aspects of the ECHR were among the most contested and thus received only limited attention in the case law of the European Court of Human Rights (ECtHR) until the 1970s and 1980s (Demir-Gürsel, 2021; Duranti, 2021). Of course, the subsequent rise in (at least partly successful) social rights litigation at the ECtHR level coincided with the first post-war shocks to the welfare state and state budgets, as well as the rise of what we now call neo-liberal critiques of a perceived bloated welfare system. While the linkages between social and economic inequality and violations of civil and political rights have now been widely accepted as empirical reality (Cismas, 2014; Therborn, 2014), and even though the ECtHR is seen as a prime example of the judicialisation of politics (Hirschl, 2011), there are comparably few ECtHR decisions on social rights. Rather, the ECtHR tends to defer to the judgement of national authorities and institutions, which may be more sympathetic to political and economic considerations than social rights.

Notwithstanding the aforementioned human rights standards, as well as reporting and collective complaints system provided through the European Committee of Social Rights (ECSR), national legislation remains the anchor for social rights definition and implementation. Within the context of European national social policies, a lot of attention has been given to law reforms that have collectively seen a contraction of welfare provision through the

introduction of budgetary cuts and the attachment of conditions or requirements to the granting of welfare benefits (Pierson, 1994; Rodger, 2012). This new era of welfare conditionality, which is most fully realised in the United Kingdom but can be found in welfare policies throughout Europe, consists of a number of related mechanisms of selecting those 'truly' in need and barring those who are not seen as meriting social protection from access to welfare systems (Dwyer, 2019a; McGann et al., 2020; Reeve, 2017; Watts & Fitzpatrick, 2018)—many of which are explored in this volume. These mechanisms include forms of means and ability testing, programs requiring active or activated participation, predictive analyses of future behaviour and sanctions for non-compliance or incentives for proactive conduct. They often claim to be more efficient, effective or at least less costly and commonly introduce market-like relations between 'clients' and 'providers', attempt to streamline, managerialise or digitise welfare agencies, and seek to incorporate private or newly privatised actors in the provision of welfare. While claiming to be evidence supported, these programs find limited success in changing organisational structures (Dent et al., 2004; Dunleavy et al., 2006; Haque, 2007; Lapuente & Van de Walle, 2020), are in danger of setting false market incentives (Ahmad, 2002; Hevenstone, 2016) and can have adverse effects on welfare provision (Dalingwater, 2014; Fletcher & Flint, 2018; Forbess & James, 2014; Koch, 2018). Crucially, as they reformulate who can access certain social rights under what conditions, they increase the linkages of legal fields within administrative, public and criminal law. As a result, both migration law and criminal law become ever more important tools of selecting denizens that can fully or partially access the welfare state by proving certain forms of (re)integration, activation and participation (Joppke, 2021; Kiely & Swirak, 2021; Maggio, 2021).

While they share certain commonalities, due to their different mechanisms of inclusion or exclusion, the different policies bundled under the label of welfare conditionality work rather differently in practice. As the universality of social rights claims clashes with the boundaries of welfare budgets, social policies rationalise who can claim benefits, and what is to blame as cause for their predicament (McNeill, 2020). Often, the conditionality mechanism is directly related to an underlying assumption of how benefit claimants—however they might be called—behave and why they are in situations of need. Crucially, these assumptions do not reflect the reality of lived experiences, but often stem from particular political or public tropes about the poor, or are informed by certain shorthand assumptions of human nature. Put broadly, they each hold a conceptualisation of how individuals should behave within their community, provide reasons for individual deviance

from this behaviour as well as steps necessary to achieve 'proper' societal participation. With the generation of welfare policies lumped under welfare conditionality, these behaviours, reasons and steps are generally heavily individualised. Unemployment thus becomes not an issue of macroeconomic trends such as globalisation, deindustrialisation or digitalisation, but of a lack of recruitable skills, or a lack of self-marketing on the labour market, or inertia caused by long-term non-participation in the workforce. As successful members of the labour force engage in lifelong learning/constantly evaluate their career options/go above and beyond their hours or quotas, unemployment programs focus on training/application and interview support/activity provision. Failure to reattain employment becomes an individual failure and might be penalised. Failure to find suitable accommodation becomes an individual failure.

Famous examples for this include the continuing re-evaluation of an individual's fitness for employment through work capability assessments. Here, persons with disabilities or chronic illness undergo regular testing to establish whether they could conceivably re-enter the labour market, even if on a temporary basis. The underlying assumption here is that people are abusing the generosity of the welfare system by overstating their health or disability claim and thus artificially removing themselves from the labour market. Individuals that are seen capable of working are usually required to participate in job seeking and/or retraining programs in order to retain a similar level of social support they did previously. Failure to comply can lead to further reductions in benefits. The academic reception of these programs has been largely negative, often citing adverse effects on the health of those that have to undergo these tests and pointing to the fact that work capability assessments tend to shift people from nonemployment to unemployment status, but do not actually activate them into employment (Barr et al., 2016; Cerletti, 2019; Dwyer et al., 2020; Hansford et al., 2019; Hassler, 2016). Other examples include attempts to incentivise people's reintegration into social services by punishing non-compliance. In the case of homelessness, this has seen places and spaces for rough sleeping drastically reduced and practices relating to homelessness—beyond rough sleeping also begging and certain uses of public spaces—being penalised. The underlying assumption here is that homelessness is a choice and a form of deviance that needs addressing through mechanisms of criminal law rather than social work. From a welfare conditionality perspective, homelessness is not linked to a lack of affordable housing or drastic changes to neighbourhoods due to tourism and gentrification, but due to a lack of skills in house hunting, too high expectations or a general lack of integration into society (Benjaminsen & Busch-Geertsema,

2009; England, 2020; Kudla, 2023). A successful tenant knows how to present herself as one or accepts the confines of accommodation available to her budget, or is a reliable user of other welfare programs. However, rather than improving the living conditions of displaced persons, this criminalisation of homelessness is seen to have had adverse effects on their security, health and their access to institutions (Evangelista, 2019; Karabanow et al., 2010; O'Sullivan, 2019; Reeve, 2017; Rodger, 2012). A further example is the increasing interlinkage of migration control and the welfare state. These policy responses assume that individuals are motivated to migrate into welfare systems. As a result, residency can be revoked upon receipt of certain kinds of welfare and welfare offices and healthcare providers—often unwillingly—become agents of migration control with registration and reporting duties. This too is often criticised, as it adds additional administrative duties and often deteriorates the relationship between officials and clients (Borrelli et al., 2021; Kootstra, 2016; Lanfranconi et al., 2020; van der Woude & van der Leun, 2017).

These examples illustrate how law reforms that aimed to make access to welfare conditional upon socially or politically acceptable behaviour—being 'truly' ill or 'truly' fit for work, rejecting deviant practices or resisting the pull of the welfare system of the destination country—are based on underlying assumptions that many find fault with, and that might have devastating effects on those excluded from the mechanisms of social protection. Indeed, these forms of reforms are often affiliated with neo-liberal ideologies that attempt to dismember the welfare state (Ahmad, 2002; Dwyer, 2019b; Pierson, 1994), and some of the adverse effects of these reforms are further explored in this volume. The mechanisms involved and their impact particularly on those at the margins of the state are important topics of research. However, it is important to emphasise that they are not new.

Who Deserves Social Rights, or the Limits of Welfare Universalism

The history of the provision of social welfare is the history of the selective provision of social welfare. For one, the systemic exclusion of minorities from societies also applied to the emerging welfare systems, in principle and practice, in Europe and abroad (Gordon, 2007; Lund, 2002; Welshman, 2013). Even more important for this chapter, studies on the history of welfare law have illustrated how the same underlying assumptions and concerns about

welfare abuse that we find in welfare conditionality programs have permeated throughout the late nineteenth and twentieth centuries. Thus, we can find similar discussions around the amendment of the British poor law of 1834 (Charlesworth, 2009; Dunkley, 1981; McCord, 1969; Wright, 2000). Here, new forms of (national) standards and administration were introduced to better control access to poor relief, which, as Charlesworth (2009, p. 3f.) argues, had been constituted as a social right at the beginning of the nineteenth century. Indeed, many point to the fact that the introduction of the infamous workhouses in which impoverished people lived and worked under gruelling conditions was a direct result of the perceived abuse of poor relief and an attempt to 'activate' individuals and motivate them to seek employment in cities rather than on land (Watts & Fitzpatrick, 2018, p. 3). Other scholars point to similarities between both mechanisms and underlying assumptions of welfare provision, comparing the past thirty years to Victorian times (Taylor, 2018), the depression era 1930s (Cooper, 2021) or the interwar period (Welshman, 2017). From this perspective, the introduction of neo-liberal forms of welfare reforms at least in the United Kingdom is less of a rupture as a recurring theme in the history of the welfare state. As a result, Cooper (2021, p. 338) argues that 'after a social democratic interlude, UK social policy may be reverting to type', indicating that important attention needs to be paid to the legal history of welfare law.

Furthermore, even though some 'welfare models' laid claim to universality—and were indeed more generous than those of other national contexts—virtually all systems of welfare have practised welfare conditionality. And while they might not have contained the identical underlying moralism, they too entailed deservingness conceptions. For one, almost all welfare programs rely on some form of categorial exclusion—of non-citizens, or non-residents at the very least, but historically, also along social constructions of difference such as gender (Mandel & Semyonov, 2006; Orloff, 1996; Orloff & Laperrière, 2021) or race and ethnicity (Freeman & Mirilovic, 2016; Scarpa et al., 2021; Schmidtke & Ozcurumez, 2008). Indeed, the conflict between inclusive welfare claims and excluding policies has been analysed as a particularly European dilemma (Sainsbury, 2012; Schierup et al., 2006) that persists until today, despite the establishment of human rights obligations. Secondly, even 'truly' universalist welfare programs often struggle to include particularly marginalised or hard to reach groups, and include registration requirements that might be difficult to fulfil for some. Thus, people living in precarious housing arrangements might not be able to provide the proof of address required in order to sign up for universal health care, language barriers, illiteracy or health impediments might cause people

to miss or not be aware of deadlines or entitlements altogether. This might be exacerbated by digitalisation efforts in the welfare state (Buchert et al., 2022; Molala & Makhubele, 2021; Nielsen & Hammerslev, 2022; Schou & Pors, 2019).

Historically, deservingness conceptions often relate to previous labour market participation—for example, all the first national social insurance programs in Sweden, Norway, Denmark and Finland required residence, employment and payment of insurance premiums to be eligible for welfare (Kautto, 2010). Indeed, the (continuing) use of the term 'insurance' for welfare services points to an individualised understanding of social protection for contributors and questions the (full) eligibility of non-contributors. And while these eligibility criteria have subsequently been widened, scholars point to the persistence of eligibility criteria and assumptions of deserving workers. For example, Kildal and Kuhnle note that access to the Norwegian pensions system was only truly universal between 1959 and 1967 (Kildal & Kuhnle, 2005). In 1930s Finland, welfare policies included both universalist programs and interventions that were based on 'rationalised treatment of poverty' and 'preventive criminal law' (Kettunen, 2006). In their overview on vagrancy laws in Sweden, Andersson points to the persistence of workfare-like forms of social intervention that sought to improve a person's situation through activation—work training (Andersson, 2017). This is seen as intrinsically linked to the ideal of the 'conscientious worker' (Ambjörnsson, 1989; Nilsson, 2013)—a deeply moralistic conception of appropriate behaviour that influenced vagrancy and drug policies in Sweden until the mid-twentieth century.

Another area in which sharp distinctions between those deserving of support and solidarity and those deserving of punishment and moral rejection is family support. Feminist socio-legal scholars have long-linked family policies to underlying 'foundational myths' of 'traditional' family units as autonomous groups (Fineman, 2000). As a result, non-traditional nor traditional but non-majoritarian forms of family often struggle to realise their right to family (Askola, 2011; Kraler & Bonizzoni, 2010; Ramos, 2011). This is particularly relevant in the case of childcare, where depending on evaluations on the best interest of the child social support can be provided within the family context or outside of it. Here, too, the 'interest' of children is laden with moral conceptions about who makes good, stable or nurturing parents, of what makes a 'nuclear family' and about the 'traditional' division of household and care tasks (Cicchino, 1996, 2000; Olk, 2007).

In all of these cases, these conceptions of good or deserving human behaviour are enshrined in social law. They are also, but not only political narratives, socio-political tropes and moral panics, but they inform the construction of eligibility criteria and shape the mechanisms through which access to social rights is granted. And because they form part of the law, they tend to change slower than debates in the media or politics. Given that in many European countries, welfare institutions have been largely stable since at least the Second World War, it seems important to take the impact of deservingness-through-law seriously.

The Long Shelf Life of Paternalistic Assumptions: Beeler v. Switzerland

In 1994, Mr. Beeler quit his job for an insurance company to care for his two young daughters following the death of his wife in an accident. The compensation office (*Ausgleichskasse*) of the Canton of Appenzell, Outer Rhodes, granted him bereavement benefits to support him. However, in 2010, following the 18th birthday of the younger daughter, the office terminated the payments, based on Sections 23 and 24 of the Federal Law on old-age and survivors' insurance (OASI), which holds that widowers were only entitled to benefits while caring for underage children, while widows remained eligible beyond that. Beeler lodged an objection to this decision on the principle of gender equality and subsequently appealed to the Cantonal and Federal Supreme Courts. In all instances, Beeler lost his appeal. He then brought his concern to the European Court of Human Rights, which decided in a grand chamber judgement (Beeler v. Switzerland, 2022) that the applicant's rights under Arts. 8 (right to family) and 14 (discrimination prohibition) of the ECHR had indeed been violated by the Swiss authorities.

While many aspects of the case merit closer attention (Margaria, 2022; Observers, 2023), what is striking for the purpose of this chapter is the unanimity with which compensation office and Cantonal and Federal courts had defended the decision to terminate bereavement benefits. Each acknowledged the existence and relevance of the non-discrimination clause in Section 8 of the 1999 Swiss Constitution and the existence of the 1996 equal opportunity act, but held that the historical reasoning for the introduction of bereavement benefits trumped anti-discrimination considerations. For example, the Federal Court acknowledges the provision of Article 8 of the Swiss Constitution, under which distinctions on grounds of sex can only be justified 'where the biological or functional differences between

men and women rendered equal treatment quite simply impossible' (Federal Court *9C_617/2011, 3.4*), and also acknowledges that the principle of the widower's pension, which presupposed the husband providing or their spouse, 'did not impose' itself on the legal scholar as justifiable exception to Article 8 (ibid., 3.5). However, as the legislator had passed the law aware of this, the court did not see its role to challenge the decision and pointed to the fact that Switzerland had not ratified the first additional protocol of the ECHR. Introduced in 1948 through the government's emergency powers in the continuing state of siege in Switzerland, the *Wittwenrente* (widow's pension) only applied to women. This was based on the assumption that women took care of the household and were thus cut off from income following their spouses bereavement (Armingeon, 2018; Binswanger & Binswanger, 1986; Luchsinger, 1995). In 1997, the scope of the pension was expanded to men, but only while they took on household duties. The reasoning behind this uneven roll-out was replicated in all official defences of the termination: Even if they stopped working while caring for their underage children, it could be assumed that men—in contrast to women—would easily reintegrate into the labour market. This assumed comparative advantage of male participation in the labour market was accepted by the office, Cantonal and Federal Courts as sufficient to warrant differential treatment without causing discrimination. Indeed, the federal government even referred to the persistence of the *male breadwinner model* in its argumentation in Strasbourg and attempted to provide statistics to bolster its claim. The grand chamber, however, rejected the line of argument, pointing out that 'the Government cannot rely on the presumption that the husband supports the wife financially (the 'male breadwinner' concept) in order to justify a difference in treatment that puts widowers at a disadvantage in relation to widows' (Beeler v. Switzerland, 2022, para. 110). Accordingly, it holds that 'the considerations and assumptions on which the rules governing survivors' pensions had been based over the previous decades are no longer capable of justifying differences on grounds of sex' (Beeler v. Switzerland, 2022, para. 113).

As the court points to the underlying 'considerations and assumptions' on which the OASI had been based, so should we pay attention to them. Switzerland is notoriously a late comer in gender equality, having established women's suffrage only in 1971 and gender equality as constitutional right only in 1981 (Eidgenössische Kommission für Frauenfragen, 1999). However, linking the aforementioned considerations and assumptions—the deservingness conditions of the OASI—simply to the general patriarchal

state of Switzerland seems too simple. In this particular case, the underlying assumptions of the widow's pension trumped all established anti-discrimination mechanisms that were promulgate (however late) to prohibit these forms of unequal treatment. This is thus not an issue of organisational or national culture, but of law and legal history. Including it into our analysis of implementation decisions thus sharpens our gaze. Crucially, this does not mean that we should assume that legal doctrine—'black letter law'—should take precedent over law in practice. It would be a folly to suggest this, given the overwhelming evidence to the contrary. However, when analysing the implementation process as a form of reconfiguration of the law (Falk Moore, 1978), we should bear in mind how all actors involved—officials, mediators and supporters, clients as well as judges and doctrinal commentators—not only refer to the text, but also the perceived 'spirit' of the law, and examine how long-held perception of what a law is about shape peoples interpretation of law reform. If policy application is conducted in spaces of asymmetrical negotiation (as we have suggested elsewhere, see Eule et al., 2018) where all actors have a—albeit limited—capacity to shape the outcome, the importance of expectation management should not be understated. This is particularly true in welfare systems that have adapted welfare conditionality mechanisms, where access to social rights is dependent on being claim-worthy, not blame-worthy.

Conclusion

Taking deservingness conceptions that govern welfare law seriously helps contextualise too-often individualised decision-making. The tension at the heart of access, eligibility or punishment decisions is often between conflicting legal notions of deservingness that have been or are being institutionalised. Paying close attention to this might help explain how in some cases, offices readily adopted neo-workfarist 'cultures of suspicion' (Affolter, 2022; Borrelli et al., 2022; Laszczkowski & Reeves, 2017), whereas in others, the resisted (Broeders & Engbersen, 2007; Leerkes et al., 2012; Ridgley, 2008). Questions of policy reform 'impact' or 'failure' might depend on the extent to which underlying assumptions of new legislation clash with those of existing ones, or in how far they 'revert to the norm' (Cooper, 2021).

Furthermore, examining these underlying deservingness conceptions in law may help us understand the behaviour of welfare applicants and recipients better, as these ideals do not only shape the evaluation of street-level bureaucrats, but also for categories that can be selectively inhabited or appropriated

by claimants, and form part of everyday tactics of resisting or selectively using the welfare state (Luna, 2009; McCormack, 2006; Miller, 1988; Scheel, 2017a, 2017b).

This chapter thus calls for a more contextualised empirical investigation into the application of welfare law. The resounding interest in the myths, tropes and behaviourist models underpinning welfare retrenchment should be made analytically fruitful by extending it to other, older and less politically contested forms of welfare provision. Despite universalist proclamations, they all entail conceptions of who deserves (more) social rights protection. Uncovering the deservingness conceptions would greatly enhance the sociology of law's claim to the analysis of policy implementation and advance socio-legal analyses of processes pertaining to transforming welfare rights into practice.

Acknowledgements I would like to thank the participants of the workshop '*European Welfare Rights in Practice*' for their valuable input. Special thanks to the editors of this volume for their excellent feedback and their boundless patience.

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3

What Is the Function of Welfare Law Today? Consequences of the Work-Line Policy

Inger-Johanne Sand

Introduction: What Is the Dilemma of Welfare Law?

Welfare law, rights and services have become an essential part of the functioning of modern democratic states by combining benefits and care for individual persons in need and taking collective responsibility for the workforce of society. States which offer comprehensive welfare rights, benefits and services are seen as welfare states (Esping-Andersen, 1985, 1990; Sejersted, 2013; Seip, 1984). There are different versions of the welfare state. The state itself may guarantee and finance all or most of the benefits, or it may be done in collaboration with voluntary or other private organisations. Welfare states are generally defined as states with a considerable level of universal benefits, and which thus offer a minimum or a certain level of economic benefits and welfare services to all irrespective of their own economic situation. Usually, this will include old age pensions, disability pensions, sickness leave benefits, child benefits and health and social services.

Welfare law thus serves a number of different purposes in society which have resulted in complex dilemmas between competing and conflictual qualities of welfare rights and services. First, welfare rights are vital parts of the catalogue of *human rights* and thus of the basic rights which are considered necessary for securing freedom and quality of life for individuals in their own

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_3

right and for society. Secondly, welfare rights are not only vital for the actual functioning of freedom rights, they are also expressions of *dignity and respect* for all, and for taking care of the most vulnerable individuals. Third, social welfare rights are vital for the functioning of *democratic government* by their contributions to a certain level of welfare and equality for all citizens. Participation in society requires not only freedom rights, but also a certain level of welfare and equality for all to enable participation and to secure a high level of social inclusion in society. Fourth, welfare rights and health services are seen as necessary and vital for *the functioning and quality of all individuals as employees* in the labour market. Fifth, welfare benefits and services are *vital factors in the economy* of nation-states and regions both as contributions to the workforce and as public expenditure. Welfare benefits, protection of employees and competences are decisive for the quality of the employees and for the inclusion of individuals in society, but they are at the same time expenses which are constantly considered in relation to effects (St.meld.nr.9, 2006–2007). European democratic states are part of global economic market-based dynamics which contribute to general demands for economic efficiency and pressure on all public budgets (Pedersen, 2011).

Welfare law and politics in democratic societies thus come with several dilemmas. Employees and their human resources and competences are arguably the most important economic resources particularly in advanced and knowledge-based economies. Sufficient and appropriate welfare rights and benefits, such as sickness and disability benefits, work-time and vacation rights, are vital parts of the protection for the whole labour force and for all citizens, both for the highly qualified and for those who are on the margins of or outside of the labour market. With the increasing economic pressure to have a sufficient and highly qualified workforce, there is a risk that also welfare law and politics are directed at the needs of the general workforce rather than at the more vulnerable groups at the margins of the labour market with disability and sickness problems. Those who are in greatest need of welfare rights may currently be at risk of being excluded or increasingly disadvantaged while general welfare state benefits for all are given more attention (NOU, 2004: 13; St.prp.nr.46, 2004–2005).

The exclusion of persons from the labour market is however also expensive both for the labour market and for its effects in terms of marginalisation.

Welfare rights, benefits and services are embedded in a network of several economic, social and political factors which are part of the labour market

and the economic systems, and which affect each other.[1] Welfare law may thus have become more of a hybrid system of combined labour, welfare and economic law than an actual system of welfare law (Sand, 2012). A flexible social welfare system combined with inclusion and exit mechanisms into the labour market may be crucial for both supplementing the labour market and the welfare and inclusion of employees (St.prp.nr.46, 2004–2005). The dilemma may be that the macro-economic and labour market economic aspects of welfare benefits may be seen as more important than the care-taking, ethical and social protection functions of welfare by political authorities and legislators. This risk is documented by the emphasis on the combined labour market and welfare-oriented reforms and not on reforms for the most vulnerable groups in the government documents referred to here. The fight against poverty for those who are not able to be part of the labour market at all may consequently suffer.

The purpose of this chapter is to show how welfare law has evolved in democratic and market-based societies into having several competing and potentially conflicting functions, and to analyse what the consequences are for the core function of welfare law which is taking care of the most vulnerable groups in society.

The legal, social and political problems discussed in this article are dilemmas of many democratic and ambitious European welfare states which also are part of a global and competitive economy (Piketty, 2014; Tuori and Tuori, 2014). Generous welfare states respecting human rights are currently experiencing rising welfare costs and competitive global markets challenging their tax base (Piketty, 2014, 2018; Pedersen, 2011). In the Nordic countries, concepts such as 'the mixed economy' and 'the societal economic narrative' are applied to describe the Nordic response to this situation (Pedersen, 2011). For practical reasons of space, this chapter will focus on current reforms of the Norwegian welfare state with significant implications for welfare rights and how these rights are practised. In 2005, the Norwegian labour and welfare law authorities were combined into one state organised authority, but with local offices in most municipalities (St.prp.nr 46, 2004–2005; Ot.prp.nr.47, 2005–2006; St.meld.nr.9, 2006–2007). The idea was that one authority should have the responsibility both for the labour market and for all welfare benefits with the dual purpose of including as many as possible in the labour market and make the transition between being on and off the labour market

[1] The various preparatory works for the new labour and welfare administration in Norway enacted in 2004–2009 document the combination of systematically different arguments applied when working on welfare reforms, see list of references for such relevant documents below.

as flexible as possible. The reform was an explicit expression of the 'work-line' in welfare politics. The goal is partly to include as many as possible in the labour market and thus fewer on welfare benefits, and partly that working should be financially more advantageous than being on welfare benefits. Welfare benefits should be designed in ways which would accommodate the transfer to the labour market and keep persons on welfare benefits as shortly as possible.

A Methodological Note

The presumption for the analysis of welfare law presented above is that even if there is a very general function of law in democratic societies, the various sub-disciplines of law may have changing functions and purposes depending on the specific legal, ideological and social contexts. Welfare law is a general concept which can have different meanings and functions. It will be argued here that inter-disciplinary analyses including both legal dogmatic interpretation and socio-legal analysis may be better suited to an understanding of the dynamic and changing character of sub-disciplines of law than the purely dogmatic and internal analysis of law (van Gestel et al., 2012). The hypothesis here is that welfare law is not only a given concept or discipline of law but may emerge in different variations depending on the context. Any change or new version needs however to be analysed critically.

Theories of communicative differentiation of modern societies have contributed to a more sociological and dynamic perspective on law which have vitally supplemented more legally internal perspectives which often apply more hierarchical and static models of law. A legal sociological perspective on law includes societal and legal change more explicitly rather than internal perspectives on law. In Niklas Luhmann's theory of communicative differentiation, modern societies are described as consisting of several different functions such as law, politics, economy, mass-media, science and art, which interact with each other through their different functions and qualities, but not in a hierarchical way (Luhmann, 2004; Sand, 2008). Sub-systems of law, economics, science and others may interact and influence each other in complex and contingent ways. There are no set or stable relations between legal, political and economic systems. They will change in form, substance and procedures over time. Changes may occur due to both external and internal causes. Welfare law may be defined as a sub-system of law. It may have been given certain functions at the early stages of modern society, but over time these functions may change depending inter alia on the interaction

between law, politics, economics and other social systems. 'Welfare' can be seen as a specific relation between different actors in society, but which can be defined in different ways. It may be defined as a general quality of the relations among all or most citizens, or it may be defined as a social quality of how the most vulnerable citizens are taken care of, depending on time and context. The theories of communicative differentiation of modern societies emphasise the dynamic and complex qualities of the interaction between different social functions and their sub-systems, including law, in opposition to more stable and deterministic qualities. The point to be made in this context is that 'welfare law' can be many different things in terms of substantive norms and procedures and thus have different functions and represent different values. Legal concepts and disciplines cannot just be continued from previous norms, but must always be analysed contextually, dynamically and critically. This includes the ideological context of previous versions of legal concepts and disciplines.

General Arguments in Current Welfare Law Reforms

Both democratic and economic institutions and the welfare of citizens depend on the functioning and the qualitative level of welfare rights and services in democratically and economically advanced states. The Nordic 'welfare states and societies' have come to be seen as important and necessary societal infrastructures on par with democracy and rule of law. Welfare states are characterised by both securing *a certain level of welfare rights and services for all* and contributing crucially to *a high degree of social and economic equality* in society. The universality of the benefits has been seen as a main argument for the legitimacy of an expensive welfare state, but it may also be an argument to the contrary (St.prp.nr.46, 2004–2005).

Nordic welfare states have attempted to combine a societal and ethical responsibility to take care of those who cannot work or take care of themselves with a high labour market participation for all groups including partially disabled.

With the increasing costs of a publicly funded welfare state, the combination of welfare measures and active labour market politics has become a focus point in welfare politics and reforms. In the twenty-first century, improved *inclusion in the labour market* has politically been seen as probably the most important way to reduce the number of persons on publicly funded welfare

and thus reduce welfare budgets (ibid.; St.meld.nr.9, 2006–2007). An alternative model for reducing the public welfare budgets could be to reduce the universal character of the general benefits and make it need based or to lower the level of the benefits to a minimum. This could mean leaving the responsibility for the most affluent part of the population to privately funded insurance schemes, or to lower the level of benefits to a minimum. So far, however, there seems to be a strong priority to keep the comprehensive and universal schemes and to keep a sustainable economic level of the benefits in order to ensure a common welfare state narrative, a common social citizenship and thus potentially a common sense of legitimacy.

Ambitious welfare states are expensive and thus require continuous balancing of the various relevant political, societal and economic reforms, rights and benefits involved. All welfare rights are thus scrutinised in relation to a variety of economic efficiency criteria. One line of conflict has been between the need for social protection (with early pensions) and the need for increased labour in society (with later pension age). Another line of conflict has been between public and private responsibility for welfare benefits such as various pensions. The *work-line* in welfare law has emphasised the need for labour in society in order to secure economic and public sector growth, but also the disciplinary and social value of participating in the labour market for individuals. Participation has been seen by many as having a higher moral value than receiving social benefits passively. This is in line with the Nordic protestant traditions in culture which emphasises social equality and work participation, but which currently may be more contested than previously (Fasting and Sørensen, 2021; Rokkan, 1987).[2]

Welfare law has often been normatively defined in the legislative language by the use of discretionary standards concepts and principles such as welfare, solidarity, social equality, social justice and rule of law, alongside more specifically formulated rights. This has however made welfare law and its rights vulnerable to budget cuts and delimitation based on demands of efficiency and competition from other political fields (Pedersen, 2011). Sickness leave benefits, benefits for asylum seekers and other migrants and family benefits are often discussed in relation to public budgets. When acute crisis situations such as the pandemic occur in 2020–2022, welfare budgets were however expanded significantly in Norway in order to pay for the unexpected rise in unemployment due to the pandemic measures on closing down society.

[2] There are many references to the cultural and economic landscape of Norway in particular and the European variations in Stein Rokkans work. This may have more historical than current significance, but points to well-known historical traditions (Rokkan, 1987, pp. 38–50, 228–229).

Historical Background for the Norwegian Welfare State

Historically, it had been the responsibility of the larger families and local communities to take care of individuals who were not able to take care of themselves. Such general duties were included in law books from the Middle Ages in Norway, but without specification. In the nineteenth century with the Norwegian constitution of 1814 and the election of a legislative parliament, Norway started a more systematic process of legislation including legislation on schools, health and social reforms. With industrialisation and increased urbanisation, it became necessary to make collective welfare arrangements by state or local authorities or by private corporations or workers organisations. In 1845, Norway had its first centralised parliamentary legislation for people who were 'poor', that is without their own property or other means. Local municipalities were given the main responsibility for the care of 'the poor' (Seip, 1984). The argumentation for the legislation was morally grounded and twofold. Partly, the emphasis was that everyone had a duty to work or participate, and partly, it was underlined that it was the responsibility of public authorities as well as of civil society actors to take care of those who could not take care of themselves and were not able to work. There were intensive discussions concerning the consequences of not following the duty to work, and what type of benefits could be given to those who were 'poor' (ibid., pp. 18–23, 34–38, 58–63). 'Poor people' was used as a particular legal category and designated those who did not own property or did not have any profession, but depended on work or money from others. There was a distinction between those who were not able to work and thus were given the right to 'beg', and those who were able to work, and who could be punished if they were unwilling to work. A third group were those who were willing to work, but unable to find work. They were at times included in the group who were punished for not working or put to forced labour. Legislation with rights for the poor was motivated by a combination of reasons, both to take care of those who could not work and to enforce a high morality of a duty to work for those able to do so. A duty to work was seen as important for the morality of the poor, also by Eilert Sundt who was considered the first Norwegian sociologist (ibid.; Sundt, 1867). His work was based on comprehensive field work, empirical observations and statistics. There was an understanding that industrialisation and urbanisation contributed to new workplaces, but also to periods of a lack of employment and thus to a need for more systematic forms of welfare measures. In the nineteenth century, social insurance schemes for those temporarily out of work, disabled or sick were initiated by

both public authorities and private employers before a universal and publicly funded welfare state model was developed. The functions and the duties of the state and of public budgets were negotiated and shaped in the last part of the nineteenth century and the first part of the twentieth century. Among the questions dealt with were who should carry the economic burden of social welfare.

The organisation of workers, tariff agreements and labour law with measures for the resolution of conflicts were vital infrastructures for how and on what level welfare problems were dealt with in the Nordic countries. In 1935, in Norway, the work-life organisations, employers and employees, agreed on a new General Framework Contract (Hovedavtalen av 1935) regulating the relations between the two sides of industrial organisation, management and labour, and their legal rights both when negotiating and under contract (Sejersted, 2013, pp. 195–197).[3] This included the rights of the parties to organise, negotiate and use strike or lock-out when in conflict, but to respect the tariff agreements for the time they were enacted for. After World War II more comprehensive social welfare measures and legislation were initiated. European states were becoming more affluent and took on increasing responsibilities for general pensions concerning sickness, families with small children, disabilities and old age. In Norway, a comprehensive social security legislation was passed by the Parliament in 1964 and a comprehensive pension reform act in 1967 (ibid., pp. 306–312; Ot.prp.nr.17, 1965–1966). It ensured old age pensions for all Norwegian citizens and those registered in Norwegian welfare registers from a certain age but kept a gradual scale depending on previous earnings. A primary purpose was to ensure those who were physically exhausted, or who had reached a certain age, a publicly funded pension. The general pension act was renewed in 1997 (Ot.prp.nr.8, 1995–1996). In 1976, a general work environment act with both substantive rights and procedures was passed (Sejersted, ibid., pp. 443–444). A municipal health service legislation act was passed in 1982, and several legislations concerning specialist health services and hospitals were enacted in the 1990s. When the reform on the combined labour and welfare administration act was passed in 2006, Norway had a wide scope of welfare services and benefits financed by the central state, but also with important insurance-like contributions from the work-life parties. It is probably fair to say that from the agreement among the work-life parties of the General Framework Contract in

[3] 'Hovedavtalen av 1935' (the General Tariff Agreement) was a vital breakthrough in Norwegian labour law between the main labour market parties after many years with long strikes and lock-outs in the 1920s and an unclear legal situation. The main principles and rights of the Agreement still apply.

1935 and the welfare legislation enacted after 1945 there were close connections between labour law and welfare legislation in the creation of a welfare state.

The Main Case Study: A Combined New Labour and Welfare Authority—The Norwegian Labour and Welfare Administration (NAV) and Its Work-Line Basis

In the twentieth and twenty-first centuries, increasing *demands for efficiency and specialisation* in the labour market have led to periods of exclusion of employees who could not meet new and higher standards of competences efficiency (St.meld.nr.9, 2006–2007). Many employers left the costs of the less efficient employees to the welfare state and its schemes for disability pensions. Over time, this has contributed to rising costs for publicly funded welfare and to increasing tendencies of social exclusion from the labour market. The negative effects of social exclusion for a relatively large group of persons and the rising costs of welfare budgets led to an increased political priority of including as many as possible in the labour market instead of on welfare, formulated as the strategy of 'the work-line'. The result was more effective and inclusive labour market policies for persons who are able to work full-time, part-time or with reduced duties, and an increased pressure to work by keeping welfare benefits on relatively low levels. It also led to a more systematic combination of labour and welfare public policies in Norway. In 2002, the first initiative was taken to combine the administration of welfare and labour politics and reforms with a report to the parliament, St.meld.nr.14, (2002–2003) Samordning av Aetat, trygdeetaten og sosialtjenesten (coordination of the labour, public pension and social services authorities). In this document, the first draft for a proposal for a fusion into one organisation of the labour, public pension and social welfare authorities was presented. The goal for such a reform was to make it easier to include more persons in the labour market instead of on social welfare by combining the different administrations and services in one organisation. Additionally, this was presumed to function in a more flexible way for the individuals involved.

In 2005, the Norwegian parliament made the final decision for a new combined labour and welfare administration (the relevant documents were: St.prp.nr.46, 2004–2005; Ot.prp.nr.47, 2005–2006; St.meld.nr.8, 2004–2005). An interim law and administration bill was passed by the Norwegian

parliament (Stortinget).[4] The main idea was to combine the functioning of the two public administrative branches of labour and welfare in order to include and activate more of the welfare benefit receivers in the labour market including making the transition between social benefits and labour market participation more flexible. The final legislative bill for a new labour and welfare administration followed in Ot.prp.nr.47 (2005–2006).[5] The new administration was to combine previous state and municipal services and to use both centralised and local facilities in order to make the services more efficient. A main goal was to create a more including work-life and society both for *general economic reasons* and in order to *create more meaningful lives* with the possibilities of work-life participation for an increasing number of persons. A more comprehensive report was delivered from the government to the Storting, St.meld.nr.9 (2006–2007) Arbeid, velferd og inkludering (work, welfare and inclusion), with further analysis and discussions on measures for some of the more vulnerable groups of persons on the margins of the labour market.

The background and the purpose of the combined labour and welfare administration reform as argued in the government reports referred to above were and still are to create the basis for a more sustainable welfare state over time and for an improved labour market. The government report St.meld.nr.9 (2006–2007) gives an extended reasoning for the reform. A high level of work-life participation throughout society is underlined as the most important and robust contribution to both the economic and financial side of the welfare state and to its inclusive qualities in terms of 'human development and good and meaningful lives'.[6] It is further argued that the goal of the work-line is to be a vital contribution to lower economic differences with fewer persons on minimum pensions, to the fight against poverty and to the improved inclusion of individuals who have experienced exclusion in the labour market (St.meld.nr.9, 2006–2007).

The measures proposed in the report are generally related to improving the functioning of the work market for as many as possible. This includes senior policies, improved integration of minorities and disabled persons and to fight any form of exclusion from the labour market (ibid., ch.1.2). The measures can be seen as 'normalising' strategies. That is to include as many as possible in a 'normal' labour market and to use measures which can be

[4] Lov om interimsorganisering av ny arbeids- og velferdsetat—Lovdata.

[5] Lov om arbeids- og velferdsforvaltningen (arbeids- og velferdsforvaltningsloven) [NAV-loven]—Lovdata.

[6] The citation is from: St.meld.nr.9 (2006–2007, Ch.1.1, p. 13) (in Norwegian.'å gi alle mennesker i hele landet mulighet til å utvikle sine evner og leve gode og meningsfulle liv').

as easily adapted to the labour market as possible. Participation or non-participation in the labour market is generally the most important economic distinction among different individuals and social groups in the otherwise egalitarian Nordic states. Inclusion can be improved through access to education on all levels and flexible mechanisms for participation of different groups (St.prp.nr.46, 2004–2005, ch.1.4). New economic benefits are proposed combining duties to take further education or work practice for those who have been employed but are laid off (St.meld.nr.9, 2006–2007, ch.1.3). The government and welfare authorities maintain as a political guideline that it must be economically beneficial to go from social benefits or pensions to paid work (St.pr.nr.46, 2004–2005, ch.1.3). The result is that many forms of social benefits are economically low and will lead to poverty particularly when children are part of the family. The authorities are thus aware of this poverty trap, but do not prioritise to change it. Educational possibilities and accessible health care are vital general structural measures for enabling all forms of labour market inclusion.

A number of different arguments in favour of the work-line in welfare politics are forwarded in the public documents mentioned. The main argumentative framework concerns an analysis on how to support and develop *a sustainable welfare state* over time economically and in terms of the human resources needed (St.prp.nr.46, 2004–2005, ch.1.2; St.meld.nr.9, 2006–2007, ch.1.1). The demographic changes in the population go in the direction of an increasingly older population with relatively more persons having left the labour market and living on old age pensions (St.prp.nr.46, 2004–2005, ch.1.2). The average living age is increasing and may result in more persons in need of social and health services. The relative number of persons who are active on the labour market, and thus available for work in social and health services, may on the other hand decrease. There are also generally *increasing expectations* in the whole population for a sustainable welfare state and health services of high quality. There is however a political consensus with a strong will to keep a welfare state with pensions, benefits and services on a high, but sustainable level (St.meld.nr.9, 2006–2007, ch.1.3). The concern is that this will be increasingly expensive. The main solution to this dilemma is to give the 'work-line' a high priority. There are macro-economic arguments for keeping as many employees as possible on the labour market and to reduce the number of persons on welfare benefits or pensions. Questions are raised concerning criteria for sickness and disability benefits and the age requirements for old age pensions generally and in different parts of the labour market, and the economic levels of social benefits and pensions. The government warned against proposals for increasing

the tax burden in order to finance the continued welfare state in the relevant documents. The argument is that the increasing internationalisation of the economy results in fewer possibilities for a higher taxation than in comparable countries (St.prp.nr.46, 2004–2005, ch.1.2; St.meld.nr.9, 2006–2007, ch.2.5).

Another line of argumentation in the governmental reports is the belief that participation in the labour market is *meaningful* for all individuals (St.prp.nr.46, 2004–2005, ch.1.3). It is seen as vital both for social participation and learning and for individual development. For persons with disabilities, work-life participation is seen as of a particularly vital individual value.

The fight against poverty is also mentioned as one of the main goals in the report which proposed a new labour and welfare administration, but with few proposals for how to achieve this goal other than through work-life participation and education. In St.meld.nr.9 (2006–2007), there are several proposals for social benefits combined with duties of part-time work or further education and with counselling in order to support those who have experienced difficulties on the labour market and to assess their work abilities over time. Social benefits combined with work or education are recommended, but to be balanced in number between on the one hand avoiding poverty traps and on the other hand securing that work participation is better paid than being on welfare benefits (St.meld.nr.9, 2006–2007, ch.1.2). 'Welfare contracts' are referred to as a tool which can be used for such combinations of welfare benefits and duties between citizens and welfare authorities (ibid., ch.10.6).

There are arguments for giving incentives for work participation, full-time or part-time, but it does not solve the poverty problems for those who are not able to work for shorter or longer periods of time and their families. Increased work-life participation is however in most government reports on social welfare and labour market politics repeated as the best and the main strategy against poverty for practically all groups, both those who can work full-time and those with disabilities who need more flexible schedules. The governmental reports have very limited analysis and proposals for welfare benefits or services for those who cannot work due to illness or severe disabilities, and the poverty trap many of these individuals will fall into. The government reports referred to above place the whole burden of how to solve the sustainability of the welfare state on the argument of 'the duty to work' and thus implicitly on the moral consciousness of welfare recipients (St.meld.nr.9, 2006–2007, ch.1.2).

There are proposals concerning specific benefits for children in low-income families in order to secure their possibilities for participation in various school

and sports activities (ibid., ch.10.7). There is special attention to immigrant families who have not been integrated into the labour market due to lack of relevant education or language problems, and thus have not been able to find work. Action plans are proposed for improving the integration of immigrant populations with language courses, housing benefits, school activities, extra teachers, work introduction and special economic benefits.

It is difficult to assess what a successful implementation of 'work-line' policies in Norway would be. St.meld.nr.9, (2006–2007) argues on the one hand that Norway already has a high degree of employment and participation in the labour market, and on the other hand that a too large number of persons in the work-active age groups are receiving welfare benefits or disability pensions (700,000 out of a total population of app. 5,550,000, in 2006). 500,000 are on sickness or disability benefits (ibid.). In 2021, the number of persons on disability pension and work-preparatory benefits was ca 510,000 and on sickness benefits ca 250,000.[7] In 2022, the number of persons on old age pensions had risen to 1,018,000. It should be noted that these numbers are difficult to compare to countries with other family and welfare state patterns. There is a high work-life participation for women in Norway and the other Nordic countries compared to many other European states, where many women will be working for their families without pay and outside of the labour market. Social and health workers, with a majority of women, may have physically hard work and rely more on sickness and disability benefits than many other employee groups.

Assessing the Combined Labour and Welfare Authority Reform: What Are the Economic, Social and Rhetorical Arguments for the Work-Line

On a societal level, work is seen as the most important resource in society for both general economic and developmental reasons, including for the continued production of welfare and social services. Being able to deliver welfare rights and services in a society depends on that as many persons as possible participate in the labour market and thus in the economic production in society. A high level of work-life participation among citizens will strengthen the possibilities for financing benefits and services for those who are not able to participate in economic activities (St.meld.nr.9,

[7] Trygd og stønad (Pensions and benefits) (ssb.no); Sykefraværsstatistikk (Sickness)—Kvartalstatistikk—nav.no.

2006–2007, ch.1.4; 2.3–2.4; 3). This view is shared by many, but exactly how to balance work and welfare is more complex. The practical aspects of a work-line strategy for a welfare state include: creating a flexible labour market for a diverse population, pensions and economic benefits for those who cannot work, and health and rehabilitation services for all (ibid., ch.2, 3; Ot.prp.nt.103, 2008–2009). The definitions of who are not able to work and what the level of disability benefits should be are more controversial. The Norwegian labour and welfare administration (NAV) reform of 2004–2005 includes the two first aspects of a welfare state and partly the third. Practically, all attention of the reform has been to include as many as possible in the labour market and in flexible ways when that is necessary and possible. Those who due to permanent illness or disabilities cannot work are, in this reform, seen as the responsibility of the health authorities. Those who can do part-time work or have subsidised workplaces should be seen as workers with all the legal rights and benefits of full-time workers. This is seen as a form of 'normalisation'. The most effective general policy is seen as that which includes as many as possible, with few exceptions, within the labour market. The main attention is thus given to a comprehensive inclusion of citizens in the labour market (St.prp.nr.46, 2004–2005, ch.1.3–1.4).

This may however result in a lack of attention to the conditions partly of those who work part-time with various subsidies arrangements and thus on a relatively low income, and partly of those who permanently cannot work due to illness or disabilities, and thus fall into poverty traps. Practically, all societies will have individuals who are not able to work full-time or at full capacity. Previously taking care of these groups has been the main target of welfare law. Currently, however, the main focus is on combined labour market and welfare politics in order to reduce the number of persons on welfare benefits and to create a more effectively functioning labour market. Judging from the preparatory works of the reform more effective inclusion in the labour market seems to be prioritised over welfare reforms for those who are initially excluded from the labour market (St.meld.nr.9, 2006–2007, ch.1.1–1.3; 3.4). The marginalised groups may still receive basic and formal rights, economic benefits and health services. Whether these rights and benefits are sufficient, dignified or proportional to their situation and in the general context of the relevant welfare state is another question which is not really discussed. The focus on labour market inclusion has arguably resulted in a lack of a normative standard for welfare rights for those who cannot work, and which the current rights and benefits can be measured to.

Expert reports can hardly realistically fully express how situations of poverty or lack of resources are experienced by those who are in that situation

over time. Statistics can give numbers, but not fully express how such situations are experienced. It is probably safe to say that even in Nordic welfare states, there is a lack of realistic description and understanding of the social and economic situation of those who are the most marginalised from the labour market, and who permanently live on a very low income such as the basic pension for those who are disabled and have never worked. The situation of these groups seems to be under-researched and under-reported in welfare state politics and reports also when general welfare reforms are discussed.

The active participation in the labour market and in specific work places is also considered *a social and ethical value* for the individuals involved irrespective of the economic consequences (St.prp.nr.46, 2004–2005, ch.1.2–1.4; St.meld.nr.9, 2006–2007, ch.1.2–1.3). Working and being part of a workplace means potential for individual development and for being part of a social group and thus social learning. 'Society' is not only public life in official institutions and the private family sphere, but also civil society and economic organisations. Both civil society participation and co-decision and cooperation at work are vital parts of 'society' in the Nordic countries. Both parts enable active participation in society and lays the ground for individual development. Active participation in all areas of society is a value it is hard to disagree with, and which is well documented.

The 'work-line' in social welfare thus still requires a closer definition and discussion on several levels. Partly, it requires a definition of what level of illness or disability which allows for benefits instead of sanctioning the duty to work, and what procedures there should be for making such decisions. Partly, it requires decisions on what the economic level of such benefits should be and of how tough the incentives for work participation should be. Some have argued in favour of a basic citizen income which should not be needs-tested and should be on a level which one can live on. This would reduce bureaucracy and avoid moralistic arguments and the use of discretion which may be experienced as contingent or unfair. The counter-arguments are that more generous universal benefits undermine the work-line and may be too expensive. The work-line may however be practised in ways which resemble a form of structural and political violence against those cannot work, and who are left with low economic benefits and situations experienced as poverty over time (Bourdieu, 2000, pp. 172–178, 202–204).

There is a balance to be drawn between how welfare authorities *require active participation* in the labour market for those who can, and at the same time *accepting and practicing dignity and generosity* for those who are not able to be part of such participation, but which need services and benefits. This

balance is in my view rarely explicitly reflected on in welfare law preparatory works. The emphasis on the economic arguments in favour of including as many as possible in the labour market, reducing welfare budgets and the referring to the individual value of work-life participation may overshadow the policies and the arguments for the ethical side of taking care of those who are not able to work. The importance of being able to finance welfare services and benefits may take attention away from how the welfare state can support those who cannot work, and how to deal with real elements of poverty in otherwise affluent states. The social and ethical arguments in favour of the welfare state are more difficult to quantify precisely than the economic arguments in favour of work-life participation and will thus always potentially be pressured by arguments of economic necessity. Respecting basic human rights and paying respect to the dignity of all persons are however also vital aspects of the welfare state. The asymmetry and different logics between the social, economic, legal and ethical arguments in welfare law may be one of the reasons for why some of the most difficult dilemmas of the welfare state are not dealt with (Luhmann, 1992, ch.8).

The Nordic welfare state tradition is *general and universal* including all citizens and thus expensive and *demanding a competent workforce*. This puts a pressure on applying the economic arguments. The Nordic cultural tradition is part of the Northern European protestant tradition emphasising participation by all, equality and a certain puritanism. Work, pensions for those who need it and health services are seen as cornerstones in the welfare reforms proposed at the beginning of the twenty-first century.

Conclusion: The Function of Welfare Law Today

The Nordic welfare state model relies on a *universal and general public pension scheme* which includes all citizens, but the level of the benefits may depend on previous work-life participation. Those who have not had previous income and paid contributions to the public pension system will be given very basic old age and disability pension benefits. With different classifications, they will often fall into categories of economic poverty.

The overwhelming argumentation for the benefits of the work-line, macroeconomically and ethically, dominates the public discourse on welfare. It is hard to disagree with the values of the work-line, but it remains problematic that a vital part of the purposes of the welfare system is systematically under-represented in welfare reforms and politics, namely how to take care of those who cannot participate in the work-life in a dignified way. The

poverty and the resulting social exclusion of a relatively large group of persons in society are absent themes in welfare politics. Up to 500,000 persons in Norway, of a total population of ca 5,500,000, are at any time on disability or similar pensions.[8] There is also around 130,000 on minimum level old age pensions.[9] There is thus a relatively large group with low income and with disabilities and thus risking social exclusion. Poverty and social exclusion are real problems for relatively large groups, and which cannot be solved by work-life participation for these. The most important welfare reforms and public reports of the twenty-first century focus predominantly on an optimistic view on the economic situation for Norway and the importance of continuing this by emphasising the work-line (St.prp.nr.46, 2004–2005, ch.1.1; St.meld.nr.9, 2006–2007, ch.1). The darker and more problematic aspects of welfare politics and the low-level benefits of less resourceful welfare recipients are not prioritised. Welfare rights and politics is not a distinctly defined social system and may thus easily be challenged by economic arguments (Luhmann, 1992). The 'work-line' may be evaluated by references to economic facts. Welfare and social rights are often more defined by more discretionary and subjective concepts such as solidarity, ethics and justice. Poverty may in part be numerically defined, but the experience of the consequences can be more diverse, social and complex to describe. Welfare law should be seen as having several and conflicting purposes. The dilemmas could be more openly reflected on even in preparatory works.

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4

The Penal Voluntary Sector's Role in the Nordic Countries: A Shadow State?

Annette Olesen, Maija Helminen, and Emy Bäcklin

Introduction

Neoliberalism, which can broadly be defined as 'political, economic, and social arrangements within society that emphasise market relations, re-tasking the role of the state, and individual responsibility' (Springer et al., 2016, p. 2), has affected the Nordic welfare states in various ways. It has been argued that the Nordic countries went through several neoliberal reforms that undermined the cornerstones of the Nordic welfare state model—universality, solidarity, and market independence—at the end of the twentieth century (Cox, 2004; Kamali & Jönsson, 2018). Practical examples of neoliberalism in the Nordic countries include, among other things, the adaptation of the New Public Management (NPM) reforms in relation to public services, which have been used, for example, to cut costs related to the provision of services (Knutsson et al., 2016).

Neoliberal reforms have also influenced the Nordic Prison and Probation Services (PPS) and resulted in a strong focus on economic efficiency during

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_4

the past couple of decades, which has led to budget cuts and reductions in PPS staff (Bruhn et al., 2017a; Korhonen, 2020; Kamp & Hansen, 2019). The consequences of workforce reduction and other pressures faced by the prison staff have been a source of concern for some time. For example, the opportunities for prison staff to engage in rehabilitative interaction with prisoners and offer them activities have declined (Bruhn & Nylander, 2018; CPT, 2019, 2020; Damsa, 2023). Moreover, the increased security focus in prisons and—especially in the case of Denmark—the more punitive prison policies (Damsa, 2023) have impacted prison staff's ability to engage in rehabilitative work even further (Bruhn et al., 2017a, b; Olesen & Rosenholm, 2021). These changes have made it less appealing to work in the PPS, and the Nordic prisons are struggling to recruit and retain well-trained staff (Karis & Karlsson, 2022; Kujala, 2020; Parhiala & Palmén, 2022; Fængselsforbundet, 2022). Another NPM-connected transformation in the Nordic PPS has been the adoption of the standardised rehabilitation programmes at the turn of the millennium (Kolind et al., 2013; Sutton et al., 2021; Tyni, 2015), which has reduced some of the flexibility of the helping work (Harrikari & Westerholm, 2015; Svensson, 2004). Particularly influential programmes have been, for example, those based on cognitive behavioural therapy (Bruhn et al., 2017b; Tyni et al., 2014) and those based on the so-called risk-need-responsivity model (Clausen, 2013; Berger, 2017). It has been argued that the adoption of these programmes has shifted the focus of the rehabilitative work from solving everyday structural problems, such as lack of housing and unemployment, to thinking and social problem-solving skills of the 'clients' (Harrikari & Westerholm, 2015; Smith, 2015; Svensson, 2004).

It is well known that many prisoners and released prisoners have significantly poorer living conditions compared to the general population (Nilsson, 2002; Friestad & Skog Hansen, 2004; Clausen, 2013; Olesen, 2013, 2018; Padfield, 2019), and many need help to access the services they are entitled to (Friestad & Skog Hansen, 2004; Swedish NAO, 2015; Pruin, 2019). Regardless of the critical situation in the Nordic PPS, it is vital to run rehabilitative programmes to improve prisoners' and released prisoners' job opportunities, education, finances, and mental health and to help them with substance abuse problems, as well as other legal and social problems, to reduce the risk of recidivism. Moreover, penal confinement must still reflect the principle of normalisation—which means, among other things, that the prisoners should be prepared for successful reintegration after imprisonment (van de Rijt et al., 2022)—in compliance with both European regulations and national legislation (Council of Europe Committee of Ministers Rec [2006]2; the Imprisonment Acts in Denmark, 2001, Finland, 2006, and

Sweden, 2010), despite the current challenges faced by the PPS. Thus, the PPS should co-operate with local authorities and other organisations in relation to preparatory release measures and enable prisoners to maintain relationships with the world outside of prison as much as possible. In order to ease the transition from prison to society, release preparations should start as soon as possible and be connected to a network of aftercare services, which are provided, for example, by the local authorities and voluntary sector agencies. However, research has repeatedly shown deficiencies in the coordination of the support measures for released prisoners, who frequently become sidelined in relation to municipal welfare services and often require extra help to access the services they are entitled to (Friestad & Skog Hansen, 2004; Swedish NAO, 2015; Lappi-Seppälä, 2019; Pruin, 2019).

Prisoner reintegration involves a number of more or less visible actors, not only from the criminal justice and welfare sectors but also from the so-called penal voluntary sector organisations (PVSOs), which refer to '…charitable and self-defined voluntary agencies working with prisoners, (ex-)offenders, their families and their victims through prison, community and policy advocacy programmes' (Tomczak, 2017, p. 3). PVSOs are not a new phenomenon either in a Nordic context or internationally; however, in a Nordic context their importance as a source of support for prisoners and released prisoners has increased due to the above-mentioned transformations in the Nordic PPS, coupled with the already well-known problems of collaboration between prisons and local authorities in assisting released prisoners (Jäntti, 2022; Olesen, 2013; Storgaard et al., 2013, pp. 15–25; Storgaard, 2019).

Regardless of the significant role played by PVSOs, knowledge about these organisations and their position in the Nordic countries is sparse, and the previous research has been dominated by Anglophone scholars. Therefore, this chapter is dedicated to answer the following research questions: What are the key challenges encountered by the Nordic PVSOs? What commonalities and differences can be identified in these challenges between the Nordic countries? How do these challenges relate to the findings of previous studies on the penal voluntary sector (PVS) in Anglophone countries? While it would also be important to investigate the potential of PVSOs' work in a Nordic context, such examination is beyond the scope of this chapter. The text proceeds as follows. First, we outline the current state of knowledge within the PVS literature. Second, we describe the data and methodological approach applied in this study, followed by a brief description of the Nordic PVSOs referred to in this chapter. Third, we analyse challenges related to funding and co-operation that PVSOs face performing in the Nordic penal fields of Denmark, Finland, and Sweden. Fourth, we draw on international

literature on PVSOs to discuss some of the similarities and differences that we have identified in relation to the Nordic PVSOs. We conclude by highlighting our most important findings and their relevance for prisoners' and released prisoners' access to rehabilitation and reintegration.

State of the Art

Despite the fact that the PVS has a long history both internationally and in the Nordic countries, it has become a subject of research only recently. The onset of the scholarly interest towards PVSOs is connected to the rise of a neoliberal policy environment in Anglophone countries such as the UK and the US in the 1980s and its implications for PVSOs. It has been argued that the neoliberal policies in these countries have created a mixed economy, where PVSOs and the private sector have been encouraged to operate as service providers alongside the public sector (Lacey, 1994; Maguire, 2012; Corcoran, 2009, 2011). This marketisation has, according to several scholars, transformed the role of some PVSOs both in the UK and in the US, as they are no longer supplementing statutory services but undertaking traditional welfare and penal state services and conducting official welfare and penal programmes (Kaufman, 2015; Hucklesby & Corcoran, 2016). In the political climate of such shadow state relationships (Geiger & Wolch, 1986; Wolch, 1990), the state is still defining the agendas for service provision and plays an important role in regulating and coordinating this area (Trudeau, 2008). The PVSOs must therefore demonstrate that they are flexible, adaptable, willing to work within prescribed limits, and document and report their service performance outcomes to be able to receive funding. In this regard, Corcoran et al. (2018) found that at least part of the PVS has begun to imitate working methods from the public and private sectors in order to survive in the commercialised and competitive funding environment.

The previous research has evidenced that PVSOs must not show flexibility and adaptability only towards their funders, but also towards the PPS, which is their partner in everyday work. For example, Mills et al. (2012) found that despite the fact that PVSOs were largely considered to be important partners for prisons in the UK, they were rarely treated as equals and rather as 'guests in a host environment', meaning that the possibilities of the PVSOs to perform were always subsidiary to the needs of the prison. For example, in the case of security concerns or when the prison staff were under a heavy workload, the importance of co-operation with the PVSOs could easily become forgotten or was found to be burdensome. Furthermore,

the previous research has noted that while co-operating with the criminal justice authorities, PVSOs face a risk of becoming co-opted into the execution of punishments and possibly becoming an extension of the criminal justice system. At worst, this can even undermine the many positive effects of the PVSOs' work (Tomczak & Thompson, 2019; see also Armstrong, 2002).

Indeed, PVSOs have been found to have different potentials in comparison with the PPS. One is that PVSOs can provide the PPS with expertise that they are lacking (Mills et al., 2012). PVSOs have also been found to be better at forming positive relationships with prisoners in comparison with PPS staff (Dominey, 2019; Mills & Meek, 2016; Tomczak & Albertson, 2016), build prisoners' self-confidence, bridge prison to society, create feelings of belonging, hope and patience, and offer prisoners a temporary breakaway from the prisoner identity (Abrams et al., 2019; Tomczak & Albertson, 2016; Tomczak & Thompson, 2019).

Based on the previous literature, we know quite a bit about the challenges and potentials of PVSOs' work in the Anglophone countries. However, PVSOs have been far less studied in the Nordic context (however, see Bäcklin, 2022a, b; Helminen, 2016; Helminen & Mills, 2019; Olesen, 2022; Olesen & Rosenholm, 2021; Persson & Svensson, 2019). As the PVS mirrors the specific legal, political, economic, and cultural context, findings from a specific country should not be extrapolated to different countries without caution (Tomczak, 2017). Undeniably, the Nordic context differs from the Anglophone countries, where the mixed economy of criminal justice is obvious as private companies and PVSOs have been contracted to run essential criminal justice services. While the neoliberal transformations in the penal field have highlighted the role of PVSOs as a source of support for prisoners and released prisoners also in the Nordic countries, service-delivery contracts between PVSOs and the PPS are rare in a Nordic context.

Data and Method

Our Nordic perspective applied in this study is based on data from Denmark, Finland, and Sweden which comes from a number of different sources that the authors have collected during years of involvement in PVS research. The different data sources cover similar themes regarding PVSOs, and the three countries were selected for investigation on the basis of the most similar method (Seawright & Gerring, 2008). Data from Denmark consists mainly of interviews with 16 employees/volunteers from PVSOs, 7 for-profit organisations working with prisoner reintegration, 15 employees from the Danish

PPS, and 24 prisoners and newly released prisoners; two focus group interviews with volunteers; observation of 18 prisoner-volunteer meetings and several mandatory introductory courses and follow-up courses for volunteers; and a survey conducted with the Danish PPS staff coordinating prisoner reintegration. The data was collected by Olesen between 2019 and 2021. Data from Finland consists mainly of thematic interviews conducted by Helminen with 21 employees/volunteers from 14 PVSOs involved in prisoner rehabilitation and reintegration and 12 employees from the Finnish PPS in 2021. Background information about the co-operation between the Finnish PPS and PVSOs has also been drawn from a survey sent to all prison and probation offices in Finland in 2021, which was targeted at directors, assistant directors, and senior criminal sanctions officials.[1] Data from Sweden consists of documents and reports from the Swedish PPS and the PVSOs that received state funding from the Swedish PPS between 2017 and 2022. This includes the Swedish PPS' strategies for collaboration with civil society (2018, p. 7), PVSOs' final activity reports to the Swedish PPS from 2017 to 2021 (no = 67), and semi-annual activity reports for 2022 (no = 16). The data was collected by Bäcklin between 2022 and 2023.

This study was conducted within a research network for Nordic penal voluntary sector research, formed by the authors in a research group funded by the Nordic Research Council for Criminology. The data was discussed and compared during a two-day working meeting in Turku in August 2022 and ten online meetings between September 2022 and March 2023. The chapter was written in a shared document which allowed for an interactive writing and analysing process.

The PVSOs in the Three Nordic Countries

To examine the PVSOs in the Nordic countries and the challenges they face, we need to be explicit about what they do and how they work. We therefore initially compared our data to map out the PVSOs' most general services targeted at prisoners and released prisoners in Denmark, Finland, and Sweden. The exact number of PVSOs is unknown because many are small and local and because some work with prisoners and released prisoners only occasionally or during certain projects. In each country, few PVSOs have targeted their support only at prisoners and released prisoners (Helminen, 2016; Olesen & Rosenholm, 2021). The mapping shows that while some

[1] The survey research was conducted together with university teacher Mia Kilpeläinen from the University of Eastern Finland.

PVSOs are specialised in meeting specific needs or contributing to solving certain problems such as substance abuse, violent behaviour, or debt, others are specialised in helping specific groups such as incarcerated women, foreign nationals, or children with incarcerated parents. A wide range of activities and support is offered by the PVSOs, such as psychological help, parental support, legal aid, art activities, value-based activities, social interaction and mentoring, educational and vocational support, and religious support. Some PVSOs educate and give advice to PPS staff, for example, in relation to children's rights issues, assessment issues, practical client work, or in relation to matters concerning certain groups of prisoners. Others offer a wide range of activities and services. One of the key issues that many PVSOs work with is helping prisoners to find accommodation, and many PVSOs also offer supportive housing services. Often, they also prepare prisoners for accessing the education system and finding work, as well as helping released prisoners to navigate the welfare system and informing them about their obligations and social rights. Additionally, civilians (who are not necessarily part of a PVSO) support released prisoners as voluntary 'assistant supervisors' (Persson & Svensson, 2019). The working styles of the PVSOs also differ. Some work on the basis of peer support, and some emphasise more help provided by professionals (Helminen, 2016). The Nordic PVSOs may also perform campaigning and advocacy work in addition to providing services and help.

The Challenges of PVSOs Operating in the Nordic Penal Field

In this section, we will present our findings regarding the challenges faced by PVSOs operating in the Nordic penal fields. We will focus on two main challenges that we identified in our data from Denmark, Finland, and Sweden.[2] These are funding structures and disorganised co-operation.

Precarious Funding

The strong welfare state favours a significant state role in welfare provision; however, the Nordic countries have restructured their public social welfare services and offloaded significant responsibility for service delivery

[2] The findings from individual countries are discussed in full in previous (Olesen, 2022; Olesen & Rosenholm, 2021) and up-coming articles.

to private companies and voluntary sector organisations in recent decades (Szebehely & Meagher, 2013; Matthies, 2006). Still, in the penal field, this has only occasionally taken place via contractual relationships between the state and PVSOs. Instead, PVSOs have begun to fill the gaps in public services unprompted (Helminen, 2019). Our data shows that the growing importance of the PVSOs is weighted differently in Denmark, Finland, and Sweden. It is perhaps most notable in the strategies of the Finnish PPS, which began to emphasise networking with the PVSOs and other relevant actors in its strategies from the 2010s onwards (Korhonen, 2020). Lately, it has also developed so-called project partnerships and introduced guidelines to coordinate the co-operation with the PVSOs, which are described as 'vital' for the Finnish PPS (Rikosseuraamuslaitos, 2022, p. 58). Nevertheless, the Finnish PPS does not regularly allocate funding to PVSOs.[3] In Sweden, the importance of PVSOs for supporting prisoners and released prisoners was acknowledged even earlier than in Finland. This was stated, for example, in the Swedish PPS' strategies for co-operation with civil society (Kriminalvården, 2006:2, 2018:7), and since 2003, the Swedish PPS has awarded grants to PVSOs (Ordinance 2002:954). The Danish PPS, on the other hand, only recently publicly acknowledged the value of PVSOs' contribution to prisoner rehabilitation and social reintegration, when it planned issuing grant funding to PVSOs and drew up a strategy to strengthen the co-operation with civil society (Justitsministeriet, 2021, p. 28). However, the pool of money for the PVSOs and the strategy have not (yet) been actualised.

Through our data, we identify an obvious paradox. Local authorities and PPS (silently) pass on significant responsibility to the PVSOs because their services do not burden public budgets significantly. At the same time, PVSOs are far from always encouraged by politicians to take on rehabilitative responsibility or included in service provision planning, as the public sector is still officially responsible for prisoner rehabilitation and social reintegration. Hence, PVSOs are rarely part of funding structures that ensure sufficient resources are allocated to close the service gap that has serious implications for released prisoners' living conditions and welfare. In this 'no man's land', PVSOs become 'the masters of their own fate', as they cannot rely on contractual or semi-contractual arrangements but must attract external money from different funding sources and simultaneously justify their legitimacy as service providers who are closing a gap in the public sector's rehabilitative service delivery.

[3] However, the Finnish PPS does occasionally buy rehabilitative services from PVSOs.

Our data shows that competition for sparse funding is a present-day reality for most Nordic PVSOs in the penal field, and this makes the continuity of their services constantly uncertain. Most PVSOs rely on various funding sources to arrange their services, including for example government and municipality grants, European Social Fund grants, and membership fees and donations. Some work solely on the basis of volunteers. Securing funding is time-consuming and so is ensuring that the project monitoring and reporting requirements are met. Small-scale PVSOs face challenges in terms of the resources required to provide, for example, statistical data in relation to reporting requirements. In addition, many PVSOs receive short-term, project-based funding that places them in a competitive and less predictable position. This also means that they have difficulties in covering operating costs to run their organisations and to train and supervise their volunteers. The precarious financial situation that defines most PVSOs is creating uncertainty and instability within the sector; it limits their ability to plan and develop projects with long-term outcomes and objectives that include and recognise rehabilitative and social reintegrative work as a slow process. Our data further indicates that PVSOs' funding structure is destabilising their co-operation with the PPS. This ultimately filters down to the prisoners and released prisoners who need help from reliable service providers to navigate the welfare system and to access welfare rights.

Especially in the case of Denmark, we noticed that the precarious financial situation furthermore makes many PVSOs reticent about participating in advocacy work for fear of losing support from significant grant givers. Despite having clear mission statements, public and private grant givers often pull PVSOs in different directions that may not align directly with their identity and purposes and, at worst, lead to goal distortion (see Kendall & Knapp, 1996). PVSOs are therefore performing a difficult balancing act, trying to please their grant givers and at the same time trying to stay true to their mission.

Regarding the time-consuming funding processes and reporting requirements mentioned above, PVSOs which are awarded grants from the Swedish PPS are not exempt from these demands, which include an application, two reporting processes annually and, in case of remaining funds, an application to be allowed to use them (Kriminalvården, n.d.; SFS, 2002:954; KVFS, 2006:12). Our data from Sweden further suggests that the PVSOs have to describe their planned activities in detail in their applications, which is limiting their ability to be flexible in meeting prisoners' needs. The agreement between the Swedish PPS and PVSOs, however, emphasises how different funding structures have a different impact on the PVSOs' position in the

criminal justice system and on their 'arrangements of power' (see Trudeau, 2008, p. 685). The PVSOs which are awarded grants from the Swedish PPS become more visible and less marginalised in the PPS. Firstly, they must comply with the application and reporting requirements and become incorporated into the PPS system and assigned to their control standards. Secondly, they also gain legitimacy and recognition for their work, as the process clarifies their roles and activities for the PPS staff. Thirdly, the PVSOs are encouraged to give feedback regarding the Swedish PPS grant process as well as to make suggestions for improvements—an opportunity some PVSOs use to make further suggestions to improve their co-operation with the PPS in general. This case from Sweden underlines how funding agreements are closely connected to visibility and legitimacy, which are vital for the PVSOs whose service delivery relies on co-operation with the PPS.

Disorganised Co-operation

In addition to the challenges related to funding, another source of challenges for the Nordic PVSOs' work that emerged from our data was disorganised co-operation and issues related to it. Based on our interpretation, one reason for the disorganised co-operation is the lack of sufficient efforts to coordinate co-operation between the PPS and the PVSOs at the local level. In all three countries, general level guidelines exist that have aimed to improve co-operation between the PPS, local authorities as well as other organisations such as PVSOs, especially concerning the release of prisoners back into society (SOU, 2021:49; Oikeusministeriö, 2021; Servicestyrelsen, n.d.). However, neither the PPS nor other agencies involved in prisoner rehabilitation and reintegration are obligated to comply with the guidelines. Therefore, we noticed that the organisation of co-operation between the PPS and the PVSOs varies a lot in different prisons, and when PVSOs are trying to fill the gaps in the welfare system, they are often caught up in the same dysfunctional cross-agency coordination identified between the PPS and the local authorities (Lappi-Seppälä, 2019; Abrams et al., 2019; Ramsbøl & Rasmussen, 2009; Swedish NAO, 2015).

The disorganised co-operation leads to various challenges for the PVSOs in their efforts to help prisoners and released prisoners. For example, the prisons often have an unsystematised practice for knowledge exchange with the PVSOs. Our data reveals that the PPS from all three countries has a haphazard approach to referring prisoners and released prisoners to PVSOs' services. Instead, the PPS' referral systems heavily rely on certain PPS coordinators engaging with PVSOs in relation to rehabilitative and reintegrative

work. A collaboration method that relies on individual connections can have consequences for prisoners who do not always get information about the PVSOs' support services. The haphazard co-operation also surfaced in the case of prisoners' sentence plans,[4] where the involvement of the PVSOs in the rehabilitation and reintegration work of prisoners is not systematically mentioned. This is also the case in Sweden, where it is an explicit aim of the Swedish government to involve civil society and PVSOs in the co-operation regarding prisoner reintegration (Ju 2016:E). This in turn can contribute to the fact that the scale of PVSOs' involvement in the Nordic penal fields is not sufficiently recognised. Furthermore, we discovered that the PPS do not always take care of informing the PVSOs about the release of prisoners, which would be important for successful voluntary-based through-the-gate programmes that rely on volunteers gaining timely access to prisoners.

Based on our research, the lack of sufficient commitment to co-operation with the PVSOs at the local level—in individual prisons—enables the PPS to treat PVSOs as 'guests in a host environment' (Mills et al., 2012, p. 398) rather than as partners despite the fact that the PPS across the three Nordic countries acknowledge the PVSOs' services and appreciate that they are releasing PPS resources by taking on rehabilitative and social reintegrative responsibility. Similarly to the research by Mills et al. (2012, pp. 398–399), the tendency to treat PVSOs as guests emerged in our data from the way in which PVSOs were seen as 'institutional inconveniences' by the prison staff at times when the prisons prioritised other duties over co-operating with the PVSOs. The PVSOs are therefore considered not only to release resources but to be resource demanding because their presence in high-security facilities requires extra control and logistical planning: security tasks that are already difficult to carry out due to prison overcrowding and staff shortages. Consequently, the PPS occasionally forget to notify PVSOs about transfers or releases of prisoners participating in PVSO programmes or forget that the PVSOs are visiting their facility and therefore have not informed or referred any prisoners or released prisoners to the PVSOs that day. Sometimes the PPS have cleared their visitors log so that the PVSOs cannot be admitted or sometimes forget to inform PVSOs about cancelled visits, which is only discovered when the PVSOs arrive at the PPS facility.

[4] A sentence plan is a structured plan for measures to be taken during incarceration or probation.

Discussion

In this chapter, we have argued that neoliberal reforms in the area of prison and probation have influenced the response of the Nordic welfare state to prisoners and released prisoners in need, which has increased the importance of PVSOs as service providers. Based on data from Denmark, Finland, and Sweden, we examined challenges that Nordic PVSOs encounter while operating in the Nordic penal fields. Our data indicates that the main challenges across the three countries relate to *precarious funding structures* and *disorganised co-operation* with the Nordic PPS. Next, we will discuss our findings further and contemplate their relationship to the previous PVS research, which has been predominantly conducted in Anglophone countries.

In comparison with PVSOs in Anglophone countries, neoliberalism has had a different effect on the relationships between the PPS and PVSOs in a Nordic context. Unlike many Anglophone countries, where the provision of criminal justice services has been opened to various agencies across the public, private, and voluntary sectors, provision of criminal justice services is still largely considered to be a responsibility of the public sector in the Nordic countries. In reality, however, the public sector has silently imposed responsibility for rehabilitative service delivery on PVSOs during the last decades. Consequently, due to the official recognition of criminal justice work as a responsibility of the public sector, co-operative structures to facilitate efficient performance of PVSOs' work have not been established.

There are, however, some differences between the Nordic countries in this regard. Finland and, notably, Sweden with their annual grant funding to PVSOs, have made more efforts to engage the sector in a way that has not yet been identified in Denmark.

Despite the differences between the funding structures of the PVSOs in the Nordic countries and in the Anglophone countries, we find that the Nordic PVSOs are also placed in a position of a 'shadow state' (see Geiger & Wolch, 1986; Wolch, 1990) because they take rehabilitative and reintegrative responsibility and carry out work that the state officially should undertake. However, as mentioned, in a Nordic context this does not typically take place via tight contracts between the PPS and the PVSOs, but the PVSOs mainly rely on other funding sources to perform their work. The low number of service-delivery contracts between the Nordic PPS and PVSOs may contribute to the low visibility of the Nordic PVSOs' work, and hence, the contributions of the Nordic PVSOs in the provision of penal services may appear minor in comparison with Anglophone PVSOs, while in reality their investments are significant.

In a way, the Nordic PVSOs may seem more independent in relation to Anglophone PVSOs because the political attention and funding structures in the Nordic countries are different. Our data nevertheless indicates that whether performing in Anglophone countries where the partnerships between the PPS and the PVSOs have been high on the political agenda since the turn of the millennium (Corcoran, 2011) or in the Nordic countries where the role of the PVSOs has not attracted similar political interest, PVSOs are still not treated as 'partners' but as 'guests' who—on behalf of the state—perform inside a 'host environment' (Mills et al., 2012).

Our findings suggest that Nordic PVSOs are also affected by other constraints identified among Anglophone PVSOs if they want to help prisoners and released prisoners in need. For example, Nordic PVSOs also 'market' themselves and demonstrate great understanding, flexibility, and willingness to conform to PPS' terms and rules to encourage PPS staff to logistically support their services. Another example is that PVSOs in Anglophone countries might compromise their campaigning and advocacy roles to avoid getting into conflict with their contractual obligations (Corcoran et al., 2018), and even though Nordic PVSOs are not subject to the same contractual restrictions, our data shows that their detachment to the PPS has a price, as they, in favour of getting access to their target groups and to maintain and support a seamless co-operation with the PPS, may also end up compromising their campaigning and advocacy roles. Therefore, even though the Nordic PVSOs rarely engage in service-delivery contracts with the PPS, our findings support that they too face challenges that have been commonly associated with PVSOs in shadow state relationships in Anglophone contexts: threats to independence, ethos, distinctiveness, and critical voice (Mills et al., 2011; Maguire, 2012; Corcoran, 2011).

The fact that the PVSOs' funding situation is unstable and that the relationship between the PPS and the PVSOs supporting prisoners' safe community reintegration is too weak is ultimately filtering down to the prisoners and released prisoners who need help from reliable service providers to navigate the welfare system, to access welfare rights, and to advocate for their rights.

Concluding Remarks

Neoliberal transformations in the penal field have increased the importance of PVSOs around the world, which is also evident in the Nordic countries. Our data nevertheless shows that the importance of PVSOs is weighted differently in Denmark, Finland, and Sweden, and even though it might be going too far to claim that Finland and Sweden are 'mainstreaming' the PVSOs in the public policy agenda (Kendall, 2000), we have identified that the two countries are slowly making a stronger commitment to engage the sector in a way that has not yet been identified in Denmark. A fundamental characteristic of the Nordic PVSOs is still however that their position in the penal fields is influenced by the ideology of the strong Nordic welfare states that to some extent place them in a tight corner, as the public sector in practice struggles to meet prisoners' and released prisoners' needs but is officially responsible for prisoner rehabilitation and social reintegration. Therefore, we have argued that the Nordic PVSOs are in a sense in position of a shadow state (see Geiger & Wolch, 1986; Wolch, 1990), as they carry out work that the state officially should carry out. We use the expression 'in a sense' because the shadow state relationships identified in the Nordic countries differ significantly from those in the Anglophone countries as criminal justice work is rarely outsourced to Nordic PVSOs. Our findings reveal how Nordic PVSOs are challenged in this shadow state position by precarious funding structures and disorganised co-operation with the PPS. While one could assume that the Nordic PVSOs' disengagement from contractual or semi-contractual arrangements and structural detachment from the PPS would place them in a more independent position compared to PVSOs in Anglophone countries, our data revealed that the Nordic PVSOs are subjected to many similar constraints in relation to their independence and critical voice as noted in previous Anglophone research on PVS. Ultimately, the challenges we found in the Nordic PVSOs' work hinder and jeopardise prisoners' and released prisoners' access to welfare rights and their possibilities for successful reintegration.

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Part II

Encounters Between Welfare Professionals and Citizens

5

A Double Helix: The Intertwined History of the Marginalisation of Welfare Clients and Their Activist Lawyers and Advisers in the Transformation of the Welfare State in England and Wales

Pete Sanderson and Hilary Sommerlad

Introduction

National variations preclude a straightforward definition of the complex arrangements and institutions that made up the post-World War II Western welfare state: the typology of three 'worlds of welfare', liberal, conservative and social democratic (Esping Anderson, 1990) has been questioned in terms of the dimensions of welfare included (Huber and Stephens, 2000; Room, 2000) and their development over an extended period (Danforth, 2014). Nevertheless, a commonality lies in the foundation of these states in a Keynesian compromise between the forces of capital and labour, characterised by an intimate relationship between post-war reconstruction based on mass production and consumption and the state provision of welfare. In Marshall's (1964, 102–3) configuration of civil, political and social citizenship, entitlement to universal social rights represented a form of common experience that could compensate for the extremes of economic inequality generated by a market economy. While this, in theory, entailed the universal recognition of citizens (Fraser, 2000) as legal subjects, epitomised by the 'right to have rights' (Arendt, 1994), from the initiation of the UK welfare state, social rights were seen as inappropriate for resolution in courts of law: thus the

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_5

1911 National Insurance Act instituted 'courts of referees' and 'umpires' were appointed to settle disputed claims for unemployment benefit.[1] This demarcation of law and a legal profession was not immediately challenged by the post-war expansion. Instead, administrative justice and tribunals were used to resolve issues raised by discretionary decision-making, or by the unlawful treatment of employees (Street, 1975). Nor was access to legal justice significantly increased by the legal aid scheme: limited to family disputes,[2] it did nothing to democratise a legal profession which, shaped to offer bespoke services to a propertied minority, had neither an interest nor expertise in the problems of the poor or welfare (Smith, 1997).

The partitioning of citizenship represented by this constitution of social rights as a separate justiciable sphere together with the general limits on access to civil law, was challenged by the work of civil society and citizen's rights groups and activists from the 1960s and 1970s in substantiating universal legal subjectivity.[3] As key actors in the period's 'new social movements' (NSMs) (Cohen, 1985), these welfare professionals sought to develop a field which,[4] structured by a social justice logic, widened the scope of legal action and disrupted the traditional professional-lay boundary. Their activities took place within an institutional framework which was both national and local, involved NGOs and local government-sponsored agencies; covered a range of issues (housing, employment rights, refugee and immigration rights and community care for example); and used Judicial Review (JR) and test cases to challenge the legal framework for the delivery of welfare.

This project's grounding in the concept of universal rights and collectivism made it a prime target of neo-liberal political economy. Designed to meet the needs of global capital (Sassen, 1999) following the fiscal crisis of the late 1970s, this rested on 'hollowing out' and disempowering nation-states' legal institutions (Arthurs and Kreklewich, 1996; Brown, 2006); deconstructing universal social citizenship and legal subjectivity; and reconstituting citizenship as 'aspirational' and exclusive of the most marginalised (Raco, 2009). The tendency to moral regulation of the poor (Chunn and Gavigan, 2004; Ewald, 1990) and subjection of welfare to its own regulatory paradigm,

[1] National Insurance Act, 1911, s.90.

[2] Legal Aid and Advice Act (LAA) 1949.

[3] The choice of term is problematic. McEvoy (2019) proposes three ideal types as heuristic devices for understanding the professional identities of the cause lawyers in his study. We refer to our respondents by the relatively neutral term activists, which covers their transgressive approach to the client relationship and role of law. When referring to broad spectrum of advisers in the UK, we deploy 'welfare professionals', which also conforms to the anthology's terminology.

[4] Bourdieu's conceptualises a field as a structured space organised around the production, circulation and exchange of its valued capitals.

which, as noted above, had long characterised welfarism, was accentuated as rights were increasingly transformed into conditional benefits, access to the courts progressively restricted and law effectively excluded from benefit appeal systems (Adler, 2016). The corollary of this programmatic pauperisation and subjection to a punitive regime (Dukelow and Kennet, 2018) of 'surplus populations' (Sassen, 2014), was the re-making of welfare professionals' habitus (or subjectivities: Newman and Clarke, 1997). In this way, despite the intensification of framework's law's inherent opacity, the legal agency of 'those living in poverty'[5] was gradually eroded.

We review this project's historical timeframe to consider the following questions: what was the context of the development of activist welfare lawyering from the 1960s onwards; what were its distinctive forms of practice; what affordances rendered it possible and how did the State's response from the mid-2000s erode its capacity to use law to address the deficits of welfare and the exclusion of the marginalised from the ambit of legal recognition? We periodise our analysis of activist lawyering as, broadly, consisting of an 'expansionary' phase from the 1960s through to the early 2000s, during which it was possible to employ the range of practices noted above to address the consequences of problematic discretion, and lacunae in welfare law; this is the focus of the following section. Section 111 outlines the ideological underpinnings of the reconfiguration of welfare as a moral evil, laying the basis for the application of neo-liberal policies from the turn of the century onwards to meet challenges to state authority: a regime of financial cutbacks and a range of technologies of surveillance, control and exclusion, legitimated by a discourse which denigrated both activist welfare professionals and their clients, progressively undercut the material and legal basis for activist practice. This process overlaps with the parallel developments in welfare policy noted above: the shift from universal to selective benefits and the increasingly tight control exerted over discretion through the use of targets, protocols and forms (Meers, 2020).

We trace the arc of this transformation by reference to policy shifts in legally aided advice and advocacy. However, the process of change was not uniform; differences in organisations and sites of practice enabled some activist professionals to maintain their forms of practice. This variability is

[5] For Lister (2006), 'living in poverty' is preferable to the stigmatising and objectifying term 'the poor'.

illustrated by data drawn from a series of qualitative studies of civil and criminal legal aid practice[6] in England, conducted from the mid-1990s to 2013, with lawyers in both not-for-profit organisations (NFP) and private for-profit (FP) firms, not-for-profit (NFP) caseworkers and managers, policymakers and clients in a range of fields of welfare. Activist lawyers and caseworkers predominated in our practitioner samples, developed using cluster techniques. The methods involved semi-structured interviews with practitioners and a limited number with clients and some observations of practitioner-client interactions. The research was carried out in four main tranches, from 1995–99; 2001–5; 2007–9; 2011–15.[7] The research was funded from different sources, and, though linked by the themes of welfare advice and representation and professionals' values and practice, had slightly different focuses in each case. The data has therefore been re-analysed for this chapter.

The UK Welfare State's 'Golden Period' and Lawyer Autonomy

New Social Movements and Activist Welfare Professionals

The expanded recognition that formed a major component of the Keynesian post-war settlement drove progressive increases in substantive equality through an expansion in socio-economic rights. However, the discretionary and opaque nature of laws governing these rights and the cost and elitism of professional services undermined universalistic principles of justice. As a result, the law represented an obvious terrain for the grassroots struggles for a post-bourgeois, post-patriarchal and democratic civil society (Cohen, 1985: 664), waged by the NSMs which emerged in the late 1960s. Realising law's normative dimensions by challenging administrative decision-making and facilitating justice for the marginalised therefore represented a key aim for these movements (Fitzpatrick, 1991; Grigg-Spall and Ireland, 1992).[8] A

[6] The majority of our studies investigated both criminal and civil since they were often linked in problem clusters; we therefore draw upon data that includes some which are largely relevant to criminal matters.

[7] For full details of methodologies, see Sommerlad, 1995, 1996, 1999, 2001, 2008, 2015; Sommerlad and Wall, 1999; Sommerlad and Sanderson, 2009, 2013; Sanderson and Sommerlad, 2011.

[8] The movement encompassed legal academics and activists who contested lawyers' domination of rights struggles, and established multiple, special interest NfP agencies (e.g. Shelter; Child Poverty Action Group (CPAG); Stone Wall; Women's Centres), whose caseworkers included those who had once been clients (Curtis and Sanderson, 2004).

politically informed desire to create a new professional identity lay at the core of their reflexivity: 'it was a political decision. I'm a member of the SWP [Social Workers' Party]… it's a way of achieving something tangible through the mechanism of law for the disadvantaged' (Lawyer 2001).

Forms of Practice in Welfare Law

The political nature of these professionals' practice is most visible in the use of their autonomy to challenge state institutions through test cases and JR. Their ability to do this stemmed from both the expanding legal aid scheme and the open texture of much of the law that governed state institutions' statutory duties, which facilitated non-compliance. For instance, in 2001 a housing lawyer described how he had judicially reviewed a local administration that had evaded their statutory duty to make grants available to renovate unfit public housing by giving out Grant Enquiry forms and then consigning applicants to a waiting list. The resulting finding of maladministration led to the system's reform across the country. Another example of the systematic use of JR was given by a childcare specialist who would challenge local authorities' manipulation of definitions of 'cared for' children to minimise payments. Noting that this practice made the firm unpopular with local authorities, he said'we're not doing anything that the law hasn't provided for … we're just here to get people what the government has said they're entitled to'. Nevertheless, this persistent, tactical use of JR to realise clients' rights, often on behalf of unpopular causes (Bondy and Sunkin, 2008) and in an explicit challenge to the traditional law and politics dichotomy, underlines the liminal status of these welfare professionals.

This status is exemplified by action repertoires based in a transgressive approach to both legal interpretation and ways of working. For instance, the Law Centres (LCs) which NSMs established from the early 1970s onwards[9] were based in local communities, with governance structures which actively involved them, and an approach to clients which gave them agency (Trubek and Kransberg, 1998: 204): 'The LC represents a judgement free

[9] In 1970, the first UK Law Centre was set up in North Kensington to dispense free advice on criminal, housing and other matters; by the end of the decade, 26 others had been set up. In response to the threat this posed to the legitimacy of traditional lawyering, the Law Society denounced activist lawyers as 'stirring up political and quasi-political confrontation far removed from ensuring equal access to the protection of the law' (in Hynes and Robins, 2009: 25), and in 1973 its defensive mobilisation led to the development of the Green Form Scheme. The broader range of civil claims this brought within the scope of legal aid, and the increase in eligibility by 1979 to 79% of the population, made social justice issues increasingly important to mainstream general practice, and 1973–85 has been described as the 'golden period of legal aid' (id.: 26), resulting in a 'socialisation' of law.

and welcoming environment, where we actively sympathise with the client's situation and look for a partnership in establishing a solution' (1996). Law's claimed detachment and narrow, single-issue focus was also rejected; by contrast these welfare professionals' epistemic practice (Knorr-Cetina, 1981) involved 'seeing a person's problem in its context. For instance, a client threatened with eviction under social nuisance legislation shouldn't be defended on narrow legal grounds—it can't just be characterised as a contract or rent dispute … the wider causes and consequences—like children—have to be addressed' (LC adviser 1996).[10] The need to contextualise problems also stemmed from recognition that clients' vulnerability made it 'impossible to go through issues a), b) and c) without looking at the wider ramifications which aren't always strictly speaking legal', and that understanding their cultural dispositions, and communicating empathy, generated trust and elicited 'the full story of their needs'. Traditional legal training's general neglect of such skills led some firms to employ NFP workers because, as a solicitor who had been a CAB[11] worker explained, 'the sector trains you in interviewing, looking at the whole problem rather than just the presenting issue, and in showing empathy, which means clients feel they can talk to you so you get the information you need' (2005).

Nevertheless, specialist legal knowledge was recognised as essential in order to 'put together the technical content of the field, organising it into some kind of principle of advocacy to move that person's case forward' (Housing charity adviser 2004). The tensions between these two sides of activist work, between the stress on legal expertise and challenge to the system's assumptions and traditional practices, repeatedly surfaced. For instance, a housing lawyer's campaigning and combative approach was rooted in his simultaneous refusal to defer to the profession's pervasive status hierarchies (Kennedy, 1982) and his sense of the power that professional status gave him, 'I am an officer of the court … I have as much right as the Judge to be there. It is my space'. He went on to contrast his determination to use his power with the effects of the voluntary sector practitioner's lower status on their capacity to challenge: '… the voluntary sector person feels they have no such right … they are over-gracious, they don't challenge or confront the judge … they under-settle'.

[10] The need to recognise the consequences of clustered and intertwined problems was confirmed by LSC commissioned research: Pleasance et al. (2004).

[11] The Citizens' Advice Bureau, one of the UK's oldest voluntary sector agencies.

Contradictions

The contradiction between exploiting the power that professional status conferred and challenging its exercise by others was exemplified by the need to handle 'legal issues in the institutionally sanctioned professional discourse' (Jensen et al., 2015: 876; Nonet and Selznick, 1978). Traditional legal methodology entailed diagnosing a problem through colligation, 'the first step in which the professional knowledge system begins to structure the observed problems', and classification, 'referring the colligated picture to the dictionary of professionally legitimate problems' (Abbott, 1988: 41). While NFP caseworkers had a degree of independence from law's epistemic practices, to be a lawyer was to internalise colligatory and classificatory practices and hence professional discourses, distancing her from the moral everyday world. The gap this could create between clients' and lawyers' views of a dispute underlines the problems inherent in practitioners' role as 'go-betweens, the translators, initiated into the rules of the game' (Ewick and Silbey, 1998: 152–153), and the 'inescapable' friction between formal and substantive justice (Hunt, 1986: 24).

These dissonances were exacerbated by the incremental translation of social relationships into legally enforceable standards (Felstiner et al., 1980–1981). The resulting tension between activist lawyers' aim to empower and the disempowerment generated by juridification (Habermas, 1987; Hertogh, 2018), reflected in the distance from clients' vernacular sense of justice, was intensified by the increasingly complex legal framework created by the conditionality of rights, and the limitations this placed on their ability to progress clients' cases: lawyers and advisers could come to be seen as just another face of the state apparatus (Sarat, 1990). As street-level bureaucrats, welfare professionals 'became the public policies they carried out' (Lipsky, 2010 [1980] xiii), holding 'the keys to a dimension of citizenship' (ibid. p. 4). The tensions generated by their liminal status weakened their capacity to fulfil this role for social justice purposes, and these tensions were progressively exacerbated by policies which began to accentuate their gatekeeping role and reduce their autonomy, and deepen fiscal restraint, ratcheting up the pressures of soaring caseloads.

Subjection to state control (via the Legal Services Commission[12] (LSC)) was formally instituted by the imposition, from the early 1990s, of New Public Management (NPM) through the franchising, and then contracting,

[12] The Access to Justice Act 1999 replaced the Legal Aid Board by the Legal Services Commission to administer legal aid funds. It oversaw the Community Legal Service which was responsible for contracting with both private firms and NFP NGOs for legal advice and assistance.

of legal aid provision.[13] NPM made the state 'the institution not only responsible to the public for the service but also … the employer of the service provided' (Gleeson and Knights, 2006: 80) and hence the ultimate arbiter of the client relationship. Its re-shaping of the epistemic practices available to practitioners, such as holistic, client-centred approach, became increasingly apparent from the early 2000s (for instance, franchises and contracts were given for specific areas of law). The subjection of legal aid lawyers to NPM therefore represents a watershed in the process of re-making the field, and practitioners' habitus. However, the foundations of this transformation date back to the 1970s fiscal crisis.

Dismantlement of the Welfare State and Access to Justice, and Colonisation of Welfare Field

The Ideological Attack on the Welfare State

In the neo-liberal narrative, the welfare state, as 'the arch enemy of freedom' (Hall, 2013), was a major cause of the crisis. The solution was a non-interventionist state, which, characterised by the primacy of private property[14] and hegemony of possessive individualism, would be grounded in market rather than social citizenship. This economisation of the social (Brown, 2006; Shamir, 2008) entailed the commodification public services; NPM would, through 'regulated devolution' (Braithwaite, 2000; Rhodes, 1997), infuse these with an 'entrepreneurial spirit' (Osborne and Gaebler, 1992), thereby reinventing government as governance, and responsibilising both service providers and users. This last objective was conceptualised as a moral project to eradicate the passivity induced by welfare (Mead, 1986). The progressive retrenchment and construction of welfare rights as inherently less deserving of legal attention[15] was signalled at the end of the 1980s by reducing eligibility for civil legal aid and ending parity between legal

[13] In the UK, NPM's core value has been cost control (Hood, 1991), effected through the managerial requirements and audit of suppliers imposed by franchising (introduced by the Tories in 1993) and contracting, the system of system of competitive tendering for contracts, instituted in 2000 by New Labour, which focuses on cost compliance. These built on the capping of the legal aid budget and fixed fees.

[14] The construction of taxation as inherently immoral has been a consistent theme; thus in 2010 David Cameron, the then Prime Minister, spoke of a 'moral duty' to cut taxes: www.dailymail.co.uk/wires/pa/article-2813464/PM-feels-moral-dutycut- taxes.html.

[15] Arguably compounded by the Woolf Civil Procedure Rules 1998 which shifted 'low value litigation' out of the courts to ADR, making the resolution of disputes increasingly discretionary.

aid and private fees, challenging the activist professional's ethos (and financial viability). Over the course of the following decades, a raft of measures effectively privatised civil law[16], which, reconstituted as a commodity, only concerned matters for which people were prepared to pay. The corollary was the representation of legal aid as 'the overprovision of justice' and legal aid professionals as exemplars of professional greed, to be controlled by a 'Value for Money' discourse which instantiated the taxpayer as the primary client of welfare services. Disciplining the welfare professional and achieving moral regulation of the poor (including by their representatives) were thus central components of the neo-liberal state-citizen relation which denied universal legal subjectivity and was characterised by a 'behaviorist philosophy relying on deterrence, surveillance, stigma, and graduated sanctions to modify conduct' (Foucault, 1977; Wacquant, 2010: 199). In the case of legal aid, a merits and means test meant legal problems could be defined as too trivial to be worthy of redress, or individuals as insufficiently needy for support.

Disciplining the Welfare Professional

Although the New Labour administration (1997–2010) retained Conservative policies of fixed fees and franchising and contracting, initially social justice elements were emphasised by re-focusing legal aid on welfare and related areas of civil law, expanding the range of eligible areas and organisations which could apply for legal aid contracts. By the early 2000s, however, NPM technologies of surveillance and control, together with further financial cutbacks and the resulting increased pressure on time, were transforming the parameters of practice in both the FP and NFP sectors. Delegation of work was becoming common practice, and in 2001 solicitors were reporting that this extended to complex work, as in this example of contesting the refusal of housing to the homeless: 'they have 21 days to prepare for review by a senior officer in the Homeless Unit, so the caseworkers must meet that deadline and make enquiries of doctors/social workers, etc. and then make detailed representations on the basis of that evidence … serious and very complicated work, now being done by unqualified workers'. Time constraints were also reported as impeding adequate supervision of less qualified practitioners, as

[16] The Access to Justice Act 1999 privatised several areas of civil law, making them subject to 'Conditional Fee Arrangements', and imposed a hard cap on the legal aid budget. This formed part of a wider move (e.g. closure of courts) which led Genn in 2012 to surmise that 'state responsibility for providing effective and peaceful forums for resolving civil disputes is being shrugged off through a discourse that locates civil justice as a private matter rather than as a public and socially important good'. https://www.ucl.ac.uk/laws/sites/laws/files/36th-f-a-mann-lecture-19.11.12-professor-hazel-genn.pdf.

this housing paralegal explained '(my supervisor) had no time to supervise me … I got an incredible case load—about 200 and I'd inch them along not having that overview of what was going on … and found I was "missing" legal issues … I felt scared' (2005). Others described how time pressure affected client relationships and hence the quality of service: 'there is virtually no time for a human dimension, or for real diagnosis. I have a lot of cases which are very complex …'; a pressure made worse by surveillance: 'a lot of my energy and time are devoted to a) watching my back and b) justifying myself and all the work I do' (employment lawyer 2005). Other responses indicated the efficacy of discourses which linked welfare to 'dependency culture': 'one of the problems with ex CAB workers is that there are boundary issues … she can't give people bad news—she can't say no. Sometimes she writes people's letters for them. She's a Mother Teresa. Now my agenda is about empowerment so I give people advice, show them how to do things, but they write their own letters'. Yet this language of empowerment masks the fact that financial cutbacks were clearly the main reason for expanding client involvement in case handling, as the following account by a family lawyer of his approach to supervising paralegals and trainees makes clear: 'I do a routine which is, "look Legal Aid clients can't have what private clients have"—they can't have the cup of tea, the nice box of tissues—you've got to train your staff in the motto of the legal aid family lawyer (which) nowadays must be "shut up snivelling, give me your instructions—you've only got another 15 minutes"' (2005).

However, the key mechanism in this colonisation of the welfare field was the cost compliance audit imposed by franchising and contracting: initially represented as advisory and supportive, its disciplinary function rapidly eclipsed all others, as less tangible value-based goals (Power, 1997) were displaced by the drive exerted on audited organisations to strive for externally imposed goals, an effect compounded by metrics designed around inputs (time ratios for specific tasks), rather than outputs (quality of advice or justice outcomes). The underpinning assumption that 'legal need' is met by service consumption rather than 'just' outcomes accelerated the standardisation and routinisation already implanted by fixed fees, progressively eroding the autonomy which underpinned activist professionals' ethos. This loss of autonomy was exemplified by the process, through the external audit, of substituting the judgement of junior, non-legally qualified civil servants for that of the lawyer, for instance, regarding the length of time needed to interview clients: in 2001 a family lawyer recounted how this had resulted in substantial reduction of her costs for an emergency injunction. She said: 'what was I supposed to do? Say time's up? She'd been threatened by him with a gun in front of the kids, and was absolutely traumatised and most of the time was

spent calming her down. That had to be done before I could even get clear instructions'. The resulting transformation of the individual professional into a subject who would self-regulate subject (Foucault, 1977) to conform with LSC rules and codes was matched by the impact on organisations; the highly regulated devolution of legal aid contracts absorbed resources in the form of staff (often senior) dedicated to managing these, which, together with the sharp reduction in fees, further incentivised the delegation to least cost labour.

Routine delegation and inadequate supervision were also fostered by the requirement to have business plans, which became increasingly demanding over time. Other devices designed to infuse activist lawyering with a business logic included the obligation to issue cost control letters to clients (thereby also responsibilising the client) and to assess eligibility for legal aid through the means and the merits test. Clearly, these practices were incompatible with a social justice logic and establishing an equitable relationship with clients, and many observed the detrimental impact on trust as a result of having to begin interviews with questions about financial means. This forcible reconstruction of role was compounded by the application of the 'strict test', which required the professional to take into account the wider public interest (Lord Chancellor's Department, 1998), making her directly responsible for cutting individual access to justice, and complicit in the 'stigma of the means test' (Titmuss, 1968).[17]

In the discursive justification for restricting costs, a central role was played by the LSC's 'model client' which was shaped by the assumption 'that all clients are articulate, together and literate people'; in practice, as one practitioner pointed out, 'clients are usually in a mess because of a complex combination of personality, social isolation, poor education, poor social skills, illiteracy, etc.' (Housing lawyer 2003). This (2001–5) study revealed how the ongoing restrictions in welfare benefits were exacerbating these problems, leading to increasingly crowded waiting rooms and clients appearing to be 'more and more disturbed, and distrustful and resentful' of advisors. One talked of the 'aggressive people who were coming to the Law Centre', and the impact this had on her way of dealing with clients: 'I've needed to become more authoritative … to change my body language, tone of voice in order to convey authority and confidence'. This perceived need to maintain status differences, impeding the possibility of developing a partnership with clients, was described by others as affecting the ability to build a decent case: 'you've got to be careful that you're not too cold, too clinical … it's a balance—you must have empathy to build trust'. Several attributed clients' growing lack of

[17] As Titmuss noted, means tests are designed to discourage benefit take-up.

trust to the discourse of contempt for lawyers which had underpinned NPM: 'the public image does nothing to enhance your image to the public; and that image comes back at you through clients, as it's clear that they feel you're all affluent and exploitative and it's not what I went into the law for'.

Progressively, the corrosive impact of these factors on practitioners' capacity to realise their value rationality extended to the NFP sector, as the LSC contract started to push it towards the business model of solicitors firms (HoCSCCA, 2004: 14), subjecting it to strict cost compliance auditing, and achieving a convergence of practice across the welfare field around scope of activity, case management practice, time-limited interventions and the closure of cases. This vindication of Stein's warning (2001: 30) that contracting with the LSC would result in a focus on high output cases, and the abandonment of diagnostic work, preventive advice, community education and policy advocacy, was exemplified by audits' reliance on the 'ideal client', leading to refusals to fund the NFP practice of helping people complete forms: 'they said you've filled in a Disability Living Allowance form for this customer, it's a simple form it doesn't require help'. Yet, as this caseworker proceeded to point out in relation to the 29-page form: 'most people—and certainly the sort of people who come to us—need help with forms … It's not something you should need to justify as being an exception, it's the norm'.

Even without the extension of the full stringency of NPM audits to the NFP sector, the shift in legal aid's focus from civil law disputes to welfare issues can be seen to represent another move towards the incremental partitioning of citizenship which underpin the neo-liberal project, since it represented a further erosion of the welfare recipient's legal agency (Adler, 2016). This process of exclusion culminated in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) which, through increasingly tight means testing and the removal of most civil matters from scope, cut legal aid funding by 40%. Its impact on access to justice was exacerbated by drastic restrictions on JR[18] and an intensification of the drive to shift the culture of NFP agencies towards 'empowering' (responsibilising) clients[19]. The responses by NFP managers in our 2011–15 research suggested this tactic was becoming effective; for instance: 'we must show that the legal aid system is about getting out of the trench and trying to help people help themselves—for instance 66% of CAB now do financial education'; another said 'the way

[18] Tightened further by the Judicial Review and Courts Act 2022. This restriction on JR, together with the then government's other blatant transgressions of their own norms, led former Court of Appeal Judge Stephen Sedley to describe 'legalism/the rule of law as now at times merely an inconvenience' (2014).

[19] An interesting example of how the neo-liberal reform project instrumentalised concepts deployed by activist lawyers to democratise legal citizenship.

forward is to promote capability and resilience—self-help'. Internalisation of the drive to entrepreneur the sector was also apparent: 'it's necessary to make the business case for funding welfare advice and legal aid'.[20] Front-line workers were more circumspect: 'how can you monetise what the government doesn't want to hear—the value of holding it to account?' Another conveyed anxiety about the shift in moral calculus for service delivery: 'to evict people is to fail and once you're out of social housing, that's it … But … now, since what we're engaged in now is effectively a business, we can't fail economically—so we must evict sooner than we would have before' (social housing advice worker 2012).

This progressive colonisation of the legal aid sector's ethos was compounded by the substitution of remote and digital service delivery for face-to-face support. In 2013, telephone-only services in social welfare legal aid services were instituted, followed by digital platforms designed to be accessed online or in centres with supermarket style arrays of terminals and 'helpers'. The particularly adverse impact on vulnerable clients of these forms of remote service delivery—again predicated on the LSC ideal type client—has been illustrated in the case of the switch to telephone-only services (Burton, 2018), and the use of the digitisation of services for the homeless (Harris, 2020). However, the problems that remote services pose for vulnerable clients are not restricted to the technologies; evidently the lack of human interaction eradicates what our data has identified as key to delivering access to justice, by establishing trust, obtaining instructions and conveying information. This form of service delivery leaches the humanity out of welfare professionalism, as 'clients' are reduced to 'clicks', and construct social rights as a residual, rather than an autonomous system (Procacci, 2001).

Conclusion

This chapter has linked the expansion of, and subsequent assault on, democratic citizenship to the emergence, flourishing and decline of activist lawyers and legal advisers. It has traced their development of an area of professional practice that not only challenged both individual injustices arising from discretionary administrative decisions and the collective injustice caused

[20] The resulting pressure for more restructuring, adoption of commercial practices and shedding of whatever remains of the sector's traditional roles (such as campaigning) have been intensified by the opening up of many services to outsourcing. A NFP conference in 2011 was deluged with pamphlets with titles like 'Social Enterprise Works' and 'Advice UK Pamphlet of Social Enterprise', which advised how to transform an agency into an enterprise and develop a business plan in order to be able to 'demonstrate there is a good market for your product...'.

by systemic maladministration and bias, but did this by enlarging legal subjectivity, thereby furthering the process of democratising citizenship. Professionalism's processual nature situates our analysis in the wider ecology (Bucher and Straus, 1961): the genesis of activist professionalism is located in the post-war welfare state that fostered civil rights and the NSMs of the late 1960s (Curtis and Sanderson, 2004). NFP civil society organisations, local government-funded advice centres and radical FP firms, supported by legal aid, hosted these professionals, and afforded them the time and space to develop an often-politicised form of epistemic and cultural practice, grounded, to varying degrees, in conceptions of holistic and empowering approaches and expansive and transgressive lawyering. These professionals' cultural capital was related to the capacity to legitimate the wider profession implicit in their drive to 'align law with justice' (Sachs, 2011).

The neo-liberal reconfiguration of the welfare state as a set of residual, and, where possible, commodified services, following the fiscal crisis of the state in the 1970s, also generated a set of policies designed to reduce costs and to ensure that discretion was used to deny, rather than enable, rights and entitlements. As our data indicates, the resulting erosion of activist practice did not proceed synchronously with the assault on welfare: the election of a Labour government in 1997 even saw a brief flowering of welfare law practice as contracts to meet 'legal need' were granted to a wide range of, often radical, NFP agencies as well as private radical FP firms. However, the impact on both individual professionals and organisations of the progressive implementation of material and discursive practices designed to transform their subjectivities and ways of working, has, over time, eviscerated the sector.

The process of impoverishing and effectively disenfranchising those 'living in poverty', is largely predicated on the de-professionalisation of activist lawyers. Along with the cuts to the funding which afforded the possibility of their form of practice, contracting organisations have been obliged to surrender their autonomous control over their working model, their case management, their priorities and the structuring of their relationships with clients; the technologies of surveillance through audit and case tracking have enabled the funding body to assert a control over them which became increasingly distant and de-humanised, legitimated by discourses of undeserving clients and rentier professionals (and see Cooke, 2022). These mechanisms have accentuated the tensions implicit in the liminality of the welfare professional project, as cutbacks forced practitioners to reduce or jettison client-centred practices, and as they were made complicit in surveillance and normative control of clients. LASPO, with its wholesale withdrawal of funding support for swathes of practice, represented a pivotal moment in this

process, though it was not the end of the ideological assaults on those activist lawyers, particularly in areas like immigration and asylum, who had managed to continue practising despite what is an increasingly hostile climate.

Our data also depicts the corresponding erosion of welfare clients' legal agency, despite the intensification of their subjection to law, along with regulation by rule and norm, and their de-humanisation, accelerated by technologies which have largely removed face-to-face encounters. A barrister's verdict on the policies of the last few decades as a 'systematic, ideological attack to remove people's rights and curtail access to justice by making it as difficult as possible to be represented', places the eradication of the 'right to have rights' and of law's radical potential, at the heart of the dismantlement of the welfare state.

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6

The Paradoxical Reality of Welfare Professionals: Encounters Between Welfare Professionals and Citizens Within Social Security in the Netherlands

Paulien de Winter

Introduction

The Dutch state decentralised the authority for the implementation of social security whereby the implementing agencies received more responsibilities. Dutch social security is mainly conducted by municipalities (social assistance agencies) and the Dutch Employee Insurance Agency. In 2022, 174.800 unemployment benefits, 395.000 welfare benefits, 3.538.400 general old age benefits and 828.500 disability benefits were provided in the Netherlands.[1] Yet, despite decentralisation, the state keeps pulling the strings by implementing stricter and more repressive laws.

In this chapter, the implementation of social security legislation is investigated from an implementer's perspective. These are the professionals who shape the policy. These professionals work with a paradoxical reality, they should treat all citizens alike and at the same time they must act responsively in individual cases (Lipsky, 2010, p. xii). The encounters between welfare professionals and citizens are studied based on interviews with professionals and observations of interactions between professionals and citizens at five

[1] https://opendata.cbs.nl/statline/#/CBS/nl/dataset/37789ksz/table (April 2022).

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_6

agencies. The central question is: *How do welfare professionals interpret and apply rules in encounters with citizens within the Dutch social security context?*

This chapter gives an insight to how, despite the stricter Fraud Act, welfare professionals are still able to leave their mark on social security legislation.[2] It shows how welfare professionals execute rules and how they find informal ways to use rules in favour of the citizens. In the section "Encounters Between Welfare Professionals and Citizens: The Situation in the Netherlands", I discuss the Dutch social security legislation. I address the legal context, the implementing agencies and the two most important obligations for citizens: the obligation to apply for jobs and the obligation to report information. In section "Street-Level Bureaucrats and Their Enforcement Styles", I will go into detail about the theoretical framework of street-level bureaucrats and enforcement styles. In the section "Methods", I address the methods, and in section "Encounters Between Welfare Professionals and Citizens in Practice", I discuss the encounters between welfare professionals and citizens and the influence of rules. In section "Differences in Enforcement Styles Further Explored", I provide a description of the variation in enforcement styles and provide possible explanations for this variation related to organisation context, age and gender. In the last section "Paradoxical Reality in the Social Security Practice", I conclude that welfare professionals differ in how they interpret the rules and how they respond to rule violations, and that they are able to find space between the rules to implement the social security legislation as they consider best.

Encounters Between Welfare Professionals and Citizens: The Situation in the Netherlands

In 2013, the Tightening Enforcement and Sanction Policy Social Affairs and Employment legislation (also called the Fraud Act) came into effect. The law is known as a tough law with little room for discretion,[3] and Dutch media speak of a 'hard approach'.[4] The National Ombudsman (2014) states that the fines are 'excessive', that innocent civilians 'are in a fix' and that the Fraud Act deals with benevolent citizens as criminals. In the section below, I describe the

[2] This chapter is based on de Winter (2019).

[3] See, for example, Tollenaar (2013, pp. 127–128) and Vonk (2014).

[4] News article NOS 04-12-14: 'Vooral onschuldigen hard gepakt door de Fraudewet' (http://nos.nl/artikel/2007089-vooral-onschuldigen-hard-gestraft-door-fraudewet.html).

Participation Act implemented by municipalities and the Employee Insurance Act implemented by the Employee Insurance Agency.[5] In the last two sections, I address the two key obligations that welfare professionals enforce.

Participation Act

The Participation Act (*Participatiewet*) is a general provision. If someone cannot provide for his or her own livelihood and is not (or no longer) eligible for another scheme, he or she can appeal to the Participation Act. Both an income test and an asset test are needed to qualify. In 2022, the standard amount per month for the maximum assistance benefit for a single person was €1.225,67 and for married couples €1.660,36. The Participation Act is implemented by municipalities. They bear financial responsibility for providing benefits. The implementation is done by official departments, often referred to as 'social assistance agencies'. In addition to providing benefits, the municipality also has a task related to reintegrating unemployed persons into the labour market.

Unemployment Act

The Employee Insurance Act (*Werkloosheidswet*) is intended for employees. This concerns persons with a public or private employment relationship and all kinds of categories assimilated to them. The employer is liable to pay contributions for the employee. Employers' insurance is aimed at absorbing the loss of income when employees can no longer work or work less hours. The act provides a temporary benefit in the event of full or partial loss of work. The benefit consists of a basic payment of at least three months (first two months 75% of the daily wage and from the third month 70% of the daily wage). The duration of the benefit depends on the employment history of the employee. The act is implemented by the Employee Insurance Agency. This is an independent administrative body commissioned by the Ministry of Social Affairs and Employment for the national implementation of official insurance. The agency also has a reintegration task.

Obligation to Apply for Jobs

The obligation to apply for jobs is monitored by the welfare professional during the reintegration interview with clients. For Participation Act beneficiaries, the obligation to apply for jobs means that they are obliged to obtain,

[5] The Social Insurance Bank and the Tax Administration were not included because employees of these agencies have hardly any direct contact with benefit recipients.

accept and keep generally accepted work to the best of their ability. Municipalities can determine the exact interpretation of this obligation by local regulation, their internal work processes or leave it to the welfare professionals. There is no uniformity between municipalities in the number of required applications and the amount of a measure for violation of this obligation.

For unemployment beneficiaries, the obligation is to make efforts to find work as soon as possible. The law requires beneficiaries to make sufficient efforts to obtain suitable employment. The Employee Insurance Agency specifies this in the obligation to perform at least four concrete and verifiable job search activities every four weeks. The uniformed work process is based on a 'matrix of measures', a tool for determining and enforcing (possibly) culpable behaviour. If it is the first time a benefit recipient has been late in submitting their job application, a warning is issued. If it is the second time, a measure for 'failure to provide information in good time' will follow: the benefit will be reduced by 5% for one month. In case of recidivism, the benefit will be reduced by 10% for one month. If a benefit recipient has not (sufficiently) applied for work, a measure for 'not trying to obtain suitable work' is implied. The benefit will be reduced by 25% for four months. In case of recidivism, the benefit will be 50% for four months.

Obligation to Report Information

The obligation to provide information is similar for both implementing agencies. This obligation means that beneficiaries must report everything that may affect the right to or amount of the benefit. This includes information about work, income and living situation. At both agencies, professionals check the obligation to provide information during reintegration interviews, through (anonymous) reports by citizens and the agencies can combine different information datasets to detect fraud or conduct random investigations.

If the obligation is violated, the beneficiary has to pay back the amount of benefit unduly paid as a result of the violation of the obligation to provide information ('disadvantaged amount') *and* an administrative fine must be imposed. If the obligation has been *intentionally* violated (a deliberate act or omission which resulted in the unjustified or excessive amount of assistance being received), the administrative fine is set at 100% of the amount of the violation. A fine of 75% is imposed if there is *gross misconduct* (a serious degree of negligence, bordering on intentional, resulting in unjustified or excessive amounts of assistance being received) with regard to the violation of

the obligation to provide information. In the case of *normal culpability* (there is no intent, but the violation is culpable), a fine of 50% is issued. An obvious mistake also falls under 'normal culpability'. In the case of *reduced culpability* (the violation cannot be fully blamed), the fine is reduced to 25% of the amount of the infringement. An official report is drawn up if the (expected) amount of damage exceeds the declaration limit of €50,000. In these cases, criminal prosecution takes place by the Public Prosecution Service.

Street-Level Bureaucrats and Their Enforcement Styles

The enforcement of social security legislation is investigated from a bottom-up perspective and this research is conducted within the street-level bureaucrat framework (Lipsky, 1980). In the first section, I will go into more detail about this perspective. The framework of street-level bureaucrats assumes that the functioning of an organisation can only be fully understood by analysing the actions of welfare professionals at the street level. In analysing the actions of welfare professionals at the street level, I use the theoretical framework of Kagan (1989) and May and Winter (2011) to classify the behaviour of front-line officials.

Street-Level Bureaucrats

It is important to examine enforcement practices because that is where policy takes shape. The welfare professional represents the government and is the gateway to benefits for citizens. A description of implementation practice provides insight into how social security legislation is applied in concrete situations. It is where policies become alive for citizens and the decisions by professionals can have a huge impact on citizens' lives.

Welfare professionals (front-line officials) are a typical example of street-level bureaucrats (Van Berkel et al., 2010; Benda & Fenger, 2014; Doornbos, 2011; May & Wood, 2003). This term was first used by Lipsky (1980) and refers to employees who have daily contact with clients. They have some discretion, limited time and resources, work for an organisation with often vague and conflicting goals, their work is difficult to control and they have involuntary clients because clients cannot go elsewhere for the services that the street-level bureaucrats provide (Lipsky, 1980, pp. 27–28; Doornbos, 2011. See also Hupe & Hill, 2007). Street-level bureaucrats have 'extensive

and difficult-to-constrain discretion of policy implementation' (Maynard-Moody & Portillo 2018, p. 258). In their encounters with clients, they decide who gets what and when. Street-level bureaucrats work with a paradoxical reality. They should treat all citizens the same and at the same time they must act responsively in individual cases when appropriate (Lipsky, 2010, p. xii). Street-level bureaucrats develop routines to deal with this reality. They create constant opportunities to act with discretion and they try to stick to previous discretionary abilities (Lipsky, 2010, p. 19).

Enforcement Styles

The concept of enforcement style was developed in the 1980s and has since been empirically researched and theoretically explored (Lo et al., 2009, p. 2709; May & Burby, 1998, p. 157). The concept is useful for empirically investigating differences in enforcement behaviour. Several definitions of the concept of enforcement style exist (McAllister, 2010, pp. 62–63; Lo et al., 2009, p. 2709; May & Winter, 2000, p. 145; May & Burby, 1998, pp. 159–160). At its core, an enforcement style encompasses the behaviour of front-line officials in their daily interactions with clients to promote compliance with rules. It involves street-level behaviour of front-line officials of implementing agencies (May & Winter, 2000, p. 145).

Kagan (1989, p. 92) identifies two stages of enforcement. The first stage is how officials define and evaluate (non-)compliance ('the way in which officials assess "compliance" or "non-compliance" with regulatory objectives'). They may interpret rules literally or flexibly. The second stage Kagan describes is the way officials respond when they have decided that a violation has occurred ('what do officials do once they have decided that the regulated enterprise's actions are "violations"'). This response to violations can be punitive and focused on sanctions (punishment) in order to achieve compliance or by convincing and persuading clients to comply (persuasion). Kagan describes these stages as 'two activities embedded in the idea of "enforcement style"'.

May and Winter (2000, p. 145) describe an enforcement style as a pattern of actions. The enforcement styles describe how officials act in their daily contact with clients. Their conceptualisation builds on Kagan and they distinguish two dimensions similar to the stages Kagan distinguishes: the 'mode of rule application' and the 'response to violation'. This delineation into two dimensions distinguishes legal interpretation of rules and reaction to violations. The mode of rule application can be strict or flexible to a greater or lesser extent, and the response to violations can be persuasive or punitive to a greater or lesser extent. They show that the degree of formalism and the

degree of coercion can be viewed separately (McAllister, 2010, p. 63). May and Winter examined the enforcement styles of Danish inspectors of livestock farms and they describe seven potential enforcement styles: accommodative style, flexible style, legalistic style, rule-bound enforcers, token enforcers, persuasive enforcers and insistent enforcers (May & Winter, 2000, p. 150).

Researchers analyse enforcement styles based on different dimensions (May & Winter, 2011, 1999; McAllister, 2010; Lo et al., 2009; Gormley, 1998; Braithwaite et al., 1987; Grabosky & Braithwaite, 1986). In this study, I use a model of enforcement styles based on Kagan (1989) and May and Winter (2000, 2011) as a framework for analysis (Kagan, 1989; May & Winter, 1999, 2011).[6] I use a simplified model, in which I combine the two dimensions into four possible enforcement styles: flexible punishment, strict punishment, flexible persuasion and strict persuasion. This distinction between enforcement styles is ideal–typical. Based on the strict enforcement trend (Fraud Act) in the Netherlands, the expectation is that most welfare professionals have a strict punitive enforcement style.

Methods

In order to investigate the encounters between welfare professionals and clients, I observed professionals during interactions with clients and I interviewed professionals at three municipalities (social assistance agencies) and two Employee Insurance Agencies. When choosing the municipalities, three criteria were used: the location (spread across the country), the size of the agency (some smaller, some bigger) and the enforcement reputation of the agency.[7] When selecting the Employee Insurance Agencies, it was decided to disregard locations with pilots in the field of enforcement and locations where there was more room for developing their own policy ('the living labs'). I was present at the agencies for a total of eleven months in the period September 2015 to June 2017. Observations were made during the daily routine of welfare professionals and they provided a picture of the daily activities of welfare professionals and their interaction with citizens. I have conducted 65 interviews with welfare professionals based on their position, age, gender and work experience. All observation notes and interview transcripts were coded with Atlas.ti. In this chapter, welfare professionals have been given fictitious names.

[6] See also Braithwaite et al. (1987) and Grabosky and Braithwaite (1986).

[7] Enforcement reputation: based on the advice of social security experts.

In order to give a structured insight into the enforcement practice in the Dutch social security context, I use a typology of enforcement styles based on two dimensions. The dimension 'method of rule application' was scored based on whether or not exceptions were allowed, the definition of a violation used, choice for or the client or the rule, and preference for customisation or uniformity. The dimension 'response to a rule violation' was scored according to the chosen enforcement activities (informing, intervening, warning, imposing measures, imposing fines), possible exemption from obligations and use of reintegration projects. Although the classification of this typology is static, it does give an idea of the possible variations in enforcement practice.

Encounters Between Welfare Professionals and Citizens in Practice

In the studied enforcement agencies, I found three styles of enforcement. The strict punitive enforcement style is most common, followed closely by the flexible persuasive enforcement style. The flexible punitive enforcement style occurs to a lesser degree. I did not find the enforcement style of strict persuasion in practice. In the enforcement practice, professionals cannot apply the rules strictly and at the same time respond persuasively to violations. This combination is not possible. In social security law, strict interpretation of the rules implies a punitive response to violations. The law gives no room for persuasion.[8] In the following sections I show by means of statements from welfare professionals and notes of conversations between welfare professionals and clients what the three enforcement styles look like in practice.

Strict Punitive Enforcement Style

Strict punishment implies that welfare professionals apply the rules rigidly and consistently and that they react with sanctions to (possible) rule violations. Alwin (Employee Insurance Agency), Saskia (Employee Insurance Agency) and Samara (municipality) can be characterised as professionals with a strict and punitive enforcement style. For these professionals, monitoring and checking is part of their daily work.

[8] It can be argued that the legislator gives executives room not to punish by indicating that there may be 'compelling reasons' or that there is 'no culpability'. In practice, however, these situations are so rare that it cannot be concluded that in practice, a strict persuasive enforcement style is used by welfare professionals.

Alwin: 'It's part of the job. I think everyone should do it because the Dutch legislation is set up for that. The Employee Insurance Agency implements it and, in the end, that's all of us. I think checking is absolutely part of it. If we didn't enforce the rules, that would create chaos.'

Appropriate to this style of enforcement is that the welfare professional prefers the rules to the clients when asked. Welfare professionals with this enforcement style indicate that the rules are the focus, not the client. When making enforcement decisions, they think about the rules first, and then about their clients.

Saskia: 'The rules, simply because in this country we have all chosen to make rules about certain things. We have to follow them. The moment you put the client above the rules, I will do it my way, my colleague does it her way and so on. Look, uniformity will never be complete, and certainly not in this way. In principle everyone should be treated the same way.'

Some welfare professionals indicate that they apply the rules in a strict literal manner because of uniformity. Professionals with this enforcement style specify that they find it important to treat everyone equally.

Saskia: 'In general, all rules are the same for everyone. And that's true everywhere. I just say 'the police don't discriminate either, when you get in your car you know you can't drive through a red light."

Samara: 'Treating everyone equally is what we have to do, because there are rules. […] And the fact that I find someone pathetic or nice, that doesn't matter. I can't do anything with it.'

Alwin: 'I think it's important in any job that you take responsibility. And that is also done here. However, I think that can be done even more. The responsibility to enforce in the right way. So, you register properly, do it the same as others. Follow the processes but also do the same for the client. A client cannot sit at a birthday or at a party or whatever and say 'I have been treated this way by the Employee Insurance Agency and you this way that is very different'.'

Professionals with this style do not readily choose to withhold a sanction. They are not afraid to ask questions or confront clients when something has not gone well. According to Saskia, there are no good reasons not to check and sanction and Alwin indicates that he always registers violations. When

violations occur, they react in a punitive manner. A formal and business-like attitude suits this.

> *Saskia*: 'In general, I am more formal than informal. I know that about myself. Only to a greater or lesser extent, it can vary from client to client. It also depends a bit on my role. When it comes to my advisory role, it can sometimes be a bit business-like. If it's about the intermediary role, then of course you also try to convince people and if informal is more appropriate there, then I am [more informal]. When it comes to enforcement, I take a very business-like approach.'

Fitting for this enforcement style is that professionals consider their monitoring role as very important. Samara sees this monitoring as a way to encourage benefit recipients to comply with the rules.

> *Samara*: 'It is community money, though. It's also my tax money. And at the end of the day, it doesn't help the client either if they get benefits wrongly. Because if it comes to the fore, he has to pay back everything and a fine on top of it. They only get further into trouble.'

The fact that these professionals apply the rules strictly does not necessarily mean that they stand behind the rule or that they think the penalties are appropriate. The point is that despite their (possible) opinion about the sanctions, they choose to impose them.

> *Saskia*: 'I think it's pretty fierce sometimes. But yes, that's how it is established. You have to deal with that.'

Flexible Persuasive Enforcement Style

In a flexible and persuasive enforcement style, the welfare professionals apply the rules flexibly and respond persuasively to violations.[9] Professionals with this style are Jan (municipality) and Martijn (Employee Insurance Agency). Professionals with this style experience freedom to make their own decisions. Martijn indicated that he makes his own decisions every day and he does not

[9] I did no legal analysis whether welfare professionals with this enforcement style acted in accordance with the legal provisions.

see this as deviating from the rules. Jan says that he interprets the law broadly when it is to the client's advantage.

Jan: 'The law is made by the legislator, who came up with the law for certain reasons. And if you go and study the law, you see that within every law there is a framework. And you have freedom. You see people anxiously just don't dare to take that freedom, which is enclosed within a law. If I'm given the opportunity, if I feel I have to take advantage of the frameworks, then I do so. All for the sake of my client.'

Fitting with this style is that professionals take little punitive action. Martijn says he imposes a measure less than once a month. If a benefit recipient misses an appointment (for which, according to the work process, a measure should be imposed), he does not consider this a reason to impose a sanction.

Researcher: 'And if that client doesn't show up at your office, for example?'
Martijn: 'Then he still doesn't get [a measure of] 5% with me.'
Researcher: 'Because then you send him a letter, you call him, what do you do?'
Martijn: 'I always call and then I ask what's going on. […] First I have to hear what the story is. Is it indeed justified that he can't come, or is it someone who really completely forgot? Then I'm not going to impose a sanction right away. I think that's too crazy.'
Researcher: 'So then you just make a new appointment?'
Martijn: 'I make a new appointment if the client says 'oh god I completely forgot, I'm at home or I didn't see it or I'm at the hairdressers, or I don't know what.' You have that once in a while, that can happen. I mean, I forget things sometimes too.'

With a flexible and persuasive method of enforcement, in situations where the rules would require them to impose a sanction, welfare professionals often choose not to impose a fine or measure. Martijn explains that it can be a choice not to enforce. For example, to prevent clients from doing nothing at all. He indicates that clients can be lucky with this. Jan indicates that he even prefers not to impose a fine at all.

Jan: 'If it can't be done, if it doesn't have to be done, I don't impose fines on people. People already have enough to worry about and I have to impose a fine. Well sorry, I don't want that. If I can get out of it, I will. I try to do that as much as possible, but sometimes I just have to. Then I talk to the

client. Often, I have managed to get one of our clients to say 'I understand, you're doing your job and you can't do anything else, yes I have been stupid, blah blah blah'.'

Researcher: 'Then you give a warning?'

Jan: 'You can't pass that on. […] I always try to dismiss it with a warning. Suppose this client, for example, has a debt of €43,000, wife deceased, and no contact with his child. I am also a father of children. Maybe he has no contact with his children because of problems with his ex-partner and things like that and then you make his life even more miserable when he does something wrong to impose a fine on him? Well sorry, no.'

Welfare professionals with this style take the liberty to interpret and apply the law broadly. Martijn does not strictly interpret the obligation of applying four times every four weeks. In interviews with clients, he adds up the application activities from all periods and if this is sufficient in total, the client has fulfilled the application obligation according to Martijn.

Martijn: 'I look at the big picture. I don't look at four applications every four weeks. I don't find that relevant.'

Researcher: 'So if the client has six job applications in the first period and two in the second period?'

Martijn: 'That's fine with me. I do tell the client then that it is not convenient. Because now it looks like he has applied insufficiently. Nevertheless, it happens very often that clients put application activities in the wrong period. If you are going to enforce that, you are wrong. Then you are going to rebuke him because he did not do two job applications, but he did them in the previous period. In the end, the important thing is that the client finds work.'

The work process and the rules are not central for these professionals. They prefer to choose customisation and sanctioning is seen as a negative approach. Both components emerge in the following situation. I asked Martijn in the situation described above if he is going to impose a recovery deadline:

Martijn: 'Absurd, it's about customisation, about the client view. Then you are wrong. Most colleagues will think like this. […] It's about the client's perspective. I don't make it a problem. If you enforce 'tjak-tjak', then you are pissing outside the pot. Then you overshoot as the Employee Insurance Agency. You have to make enforcement negotiable. You have to keep clients enthusiastic. You don't have to act like a policeman.'

What emerges with these professionals is that they do not see themselves as inspectors or as persons who hand out sanctions.

Researcher: 'How do you feel about your controlling role?'
Martijn: 'I don't sit here as a control officer. Just politically speaking, I don't have a control role. And I don't want to.'

They are convinced that most clients who fail to fulfil obligations do not do so intentionally.

Jan: 'Because it hasn't come up that someone is intentionally trying to defraud the service or misuse community funds. Until possibly proven. There have been misses and people have been fined or people have fallen through. But I'm keeping it as an incident.'

Flexible Punitive Enforcement Style

With a flexible punitive enforcement style, welfare professionals apply rules flexibly and respond punitively to rule violations. Tom (municipality) and Jos (municipality) are examples. Both indicate that it is important that the rules are not always put central.

Jos: 'I think a good enforcer not only looks at the rules, but also at circumstances.'
Tom: 'Assistance starts with the client, not the rule. […] You can't do this work from paper. Maybe it will go flawlessly and it will be technically correct, but the moral and the human, I don't see how you can then give substance and esteem to that. […] My client is leading; I think that's the way it should be. That is also what Article 18 requires of me.'

The professionals indicate that they experience freedom to deviate from rules.

Tom: 'Sometimes you have to dare to step over a rule. […] A woman who may lose her son and husband. Then you can be very formal and indicate 'this and this you still have to report everything'. You know in advance that she won't make it. At that point, you just have to have the guts to say 'you know what, I'm going to cut corners and see from there.' That means that we have

now granted assistance first and we're going to check again afterwards to see if it's all right. That is daring to step over a rule.'

Jos indicates that he experiences freedom to make choices and to take his own direction in fraud investigations. Tom indicates that he makes the assessment and he takes decisions in the consulting room and he does not have to consult with his manager.

Tom: 'It is weird that we say 'the client has his own responsibility' and then we don't dare to take it ourselves. Therefore, I am in favour of that. Let me determine it. I just calculate that there can be mistakes in it, period. I assume everyone is doing their job to the best of their conscience.'

Appropriate to this style is that the professionals are clear in what they will and will not tolerate and that sanctions are imposed in case of violations. Tom indicates that he would never choose not to impose a fine in a situation where a fine is the appropriate response. This style involves professionals seeing themselves as watchful for fraud. Tom describes this as something that comes with his job and as something that 'has to be done'.

Tom: 'I always keep in mind the possibility that the story is different from what they tell me. I think you pretty much try to rule out any inconsistencies. Now that seems like a soulish and very easy thing to do, but it's a born suspicion to see 'hey is that right?'. The moment he passes that test, he's in. Then I do trust him.'

These professionals do not believe that sanctionable behaviour should be borne by the benefit recipient.

Tom: 'I always start with 'you tricked me.' That's behind you, you'll pay for that now and you'll remain dependent on social security. You did this once, but you won't do this to me twice. That's how I open after fraud by default. Then it's up to him to do something with that, but I don't feel like letting that haunt him for the rest of his life. I personally never feel hurt in that either.'

Differences in Enforcement Styles Further Explored

The expectation that most welfare professionals would have a strict punitive enforcement style is only partly confirmed. Although the most common enforcement style is a punitive enforcement style, many professionals have a flexible persuasive or flexible punitive enforcement style. The prevalence of the enforcement styles between both types of agencies is similar. Both at the municipalities and the Employee Insurance Agencies, the punitive enforcement style is most common, closely followed by professionals with the flexible persuasive enforcement style. At both agencies, there are some professionals with the flexible punitive style and no professionals with the strict persuasive enforcement style.

There is also variation at the level of individual agencies. In the first municipality, the style of strict punishment is almost non-existent. Most professionals at the first municipality apply the rules flexibly and respond persuasively to violations. The employees can be characterised as professionals with a flexible persuasive enforcement style. At the second municipality, there is little evidence of flexible persuasion. The professionals can be characterised as having a more strict and punitive enforcement style. Almost all professionals respond to violations in a punitive manner. Most professionals apply the rules strictly. Only a few can be characterised as less strict. At the third municipality, all three styles are found. The professionals at the third municipality differ the most in their enforcement style. Some professionals apply the rules flexibly, while others apply the rules strictly. The degree of punishment in responding to violations also differs. One professional clearly has a different enforcement style; this professional has a flexible persuasive enforcement style.

A similar distribution to the municipalities, I also encountered at the Employee Insurance Agencies. At the first agency, most professionals have a punitive enforcement style. The first agency mainly employs professionals with a strict punitive enforcement style. The professionals surveyed can be characterised as professionals who respond to violations in a punitive manner. Most professionals apply the rules strictly. The flexible persuasion is almost non-existent. Only one professional can be characterised as flexible and persuasive. In addition, two professionals can also be characterised as flexible rule followers, however, they react punitively to violations. At the second agency, most professionals have a flexible enforcement style. The flexible persuasive enforcement style is relatively common and the strict punitive style is almost non-existent. The enforcement styles of the professionals

vary. Some professionals have a flexible persuasive enforcement style while others respond more punitively to violations and apply the rules more strictly. Overall, professionals at the second agency have a more flexible and more persuasive enforcement style than professionals at the first agency.

Possible explanations for the variance in enforcement styles can be found both at the level of the individual professional and in the organisational context. At the level of the professional, the variation in enforcement styles within agencies can be partly explained by their age, work history and gender. My research shows that older professionals (55 years and older) apply rules more flexibly and respond less punitively to violations than the younger age groups.[10] Hawkins (1984) also finds in his research that older inspectors are more flexible than younger inspectors. Older inspectors are according to Hawkins sympathetic to the difficulties and costs of compliance while younger enforcers emphasise formal enforcement and see all cases as potential prosecutions. Pautz and Rinfret (2016) find in their research that the older the enforcer, the higher the level of trust in interaction with the enforcer. Gormley (1998) has opposite findings, finding in his research that older inspectors are actually harsher critics and younger inspectors are milder. Finally, Hedge and colleagues (1988) find no relationship between the age of the inspector and his enforcement behaviour. Thus, the various studies are not unambiguous about the correlation between age and enforcement style.

The impression is further that welfare professionals often stay with the same employer for a long time. As a result, it is likely that the length of time they are employed by the implementing agency is related to the age of the employees. Gormley (1998), who expected younger, less experienced employees to work more 'by the book', while older and more experienced employees rely more on their own judgement, indeed find in his research that more experienced employees rely more on their own judgement.

I also found a correlation between the gender of the professional and their enforcement style. The majority of women respond punitively to rule violations. Looking at the men, as many respond with punishment as with persuasion. Of the men, the majority apply the rules flexibly. About as many women apply the rules flexibly as strictly. Women are more likely to respond punitively to violations and men are more likely to apply the rules flexibly. However, Benda and Fenger (2014) find their qualitative research on social security employees does not show clear differences between men and women.

Possible explanations for the variance in enforcement styles in the organisational context are the enforcement policy, frequency of contact with the

[10] de Winter (2019).

citizens and the direction by the management. There is a correlation between the (local) enforcement policy and enforcement styles of the professional. An implementing agency with a strict enforcement policy has employees with a more strict and punitive enforcement style than an implementing agency with a less strict enforcement policy. Wood (2003) examined four building inspections in four cities and found that context is a significant predictor of the enforcement approach.

In analysing the differences in the frequency of contact between the agencies studied, I found that in agencies where professionals have more frequent contact with clients and know welfare recipients better, professionals enforce more persuasively than in agencies where employees have less contact with clients. Professionals' choice of persuasion or punishment appears to be related to Donald Black's (1987) relational distance. He argued that the greater the distance between employee and client, the greater the likelihood of enabling justice. In practice, when there is a 'relationship' between a professional and the citizen, the persuasive approach is usually chosen. This conclusion is confirmed in several studies. For example, Grabosky and Braithwaite's (1986) research finds support for the assumption that the theory of relational distance is an explanatory factor for differences in enforcement between enforcement agencies. They find that the larger the number of businesses to be enforced, the more frequent the use of criminal sanctions. And professionals who have more frequent contact with clients, punish less formally than employees who have less contact with clients. So, it could be the case that professionals who have frequent contact with citizens (in other words, who 'know clients') are less punitive because of relational distance. Hutter (1989) also finds confirmation for the relational distance thesis in her research. She finds that enforcers who enforce in a small community typically know the individuals and assume that they are dealing with good, respectable persons who need advice and education; while enforcers who work with larger communities have a more suspicious attitude that makes them more likely to choose formal enforcement options.

I further found that the direction by the management of the enforcement agencies studied varies. This direction varies from emphasising work processes and formal rules to giving professionals freedom to make their own decisions. A lot of discretionary space can lead to a more flexible and persuasive enforcement style by giving professionals room for a broader interpretation of the law. At the same time, discretionary space can lead to variation in enforcement styles as professionals decide how to enforce.

Paradoxical Reality in the Social Security Practice

This research provides insight into the closed world of social security enforcement and shows that welfare professionals differ in how they enforce rules. The central question of this research was: *How do welfare professionals interpret and apply rules in encounters with citizens within the Dutch social security context?* I investigated the enforcement styles of welfare professionals in the Netherlands based on the dimensions 'rule interpretation' (the degree of formalism) and 'response to rule violation' (the degree of coercion) (based on May & Winter, 2011). This research shows that welfare professionals differ in their enforcement styles. Professionals differ in how flexible or strict they interpreted the rules and what they define as a rule violation. Professionals also differ in how they respond to rule violations, some respond more persuasively while others choose to react more punitively.

The paradoxical reality described by Lipsky (2010), can also be found in the implementation practice of social security law enforcement in the Netherlands. Lipsky described the paradoxical reality as the dilemma of street-level bureaucrats to treat all citizens the same and act responsively in individual cases. The different enforcement styles give an insight into how welfare professionals deal with this dilemma. At the implementing agencies, the enforcement styles of strict punishment, flexible punishment and flexible persuasion were found. I have not encountered the enforcement style of strict persuasion in social security practice. It could be argued that some professionals tend more towards 'treating all citizens' the same, for example, the professionals that are classified as having a strict punitive enforcement style. These are professionals who interpret the rules literally. They argue that a literal interpretation of the rules is necessary for uniformity. Professionals with this enforcement style feel that monitoring and checking is part of daily work and choose uniformity in enforcement. Not imposing a sanction is not an option for these employees.

Other professionals tend more towards 'responsiveness', as for example the professionals with a flexible persuasive enforcement style or with a flexible punitive enforcement style. They interpreted the rules more flexible, and in a flexible persuasive enforcement style, the professional applies the rules flexibly and tries to persuade the client to comply. Professionals with this enforcement style choose the 'client' in case they have to make a choice between the 'rules' and the 'client'. When a choice has to be made between 'treat everyone equally' and 'customisation', these professionals choose 'customisation'. Professionals with a flexible punitive enforcement style apply rules flexibly and they respond to violations with sanctions motivated by the

understanding that sanctioning is part of their job and that clients have responsibilities. These professionals indicate that rules do not always have to be central and that they experience freedom to deviate from rules.

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7

Asylum Case Adjudication in Sweden, Country of Origin Information and Epistemic Violence

Martin Joormann

Introduction

During Europe's 'long summer of migration', in 2015, Sweden was the country that received the highest per capita number of asylum applications of all EU-member states (UNHCR, 2016), as 162,877 applications for international protection were filed with the Swedish Migration Agency (hereafter SMA; Migrationsverket, 2016). The shift towards a more repressive Swedish refugee policy, which in early 2016 was introduced by the Social Democrats as a temporary change that should give Sweden 'breathing space', was formalised by the red-green coalition government with a revised asylum law in 2021, which transformed the supposed-to-be temporary changes into a more permanent set of restrictions (Giansanti et al., 2022; Asylarkivet, 2022; Nordling and Persdotter, 2021). After their election victory in the autumn of 2022, the new government coalition of right-wing and neo-liberal parties has announced considerably more far-reaching restrictions ('Tidö Agreement', see Civil Rights Defenders, 2022).

To give an example from statistics and to compare with the EU country that received the highest total number of refugees in recent years, Germany rejected 52% and Sweden 71% of initial asylum claims filed in 2019 (EUROSTAT, 2020). Once the initial claim is rejected, the way that remains for the

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_7

applicant to be legally allowed to stay in Sweden, is to appeal for the decision to be overturned by the SMA itself (first legal instance) or in a court of law (second and third instance, see Sveriges Domstolar, 2023). For asylum applicants, the vulnerable group in the focus of this chapter, being granted the legal right to stay in Sweden is vital for their access to social rights and the possibility to receive welfare provision. In short, the asylum determination procedure is central for the process of granting access to legal and social rights in Sweden. This procedure relies heavily on establishing certain 'facts' about asylum applicants and their countries of origin. Given the importance of this country information (see e.g. Rosset, 2019), the epistemic question of 'What is knowledge?' is crucial in the legal process that recognises certain 'country of origin information' (COI) to be 'factual information' (see e.g. Johannesson, 2017). However, when reviewing the literature about the practices of adjudicating asylum cases, one finds only a few studies that examine the internal operations of Sweden's legal system (e.g. Wikström and Stern, 2016; Lundberg, 2011). Even fewer studies in the Swedish context problematise COI within the asylum determination procedure (e.g. Elsrud et al., 2021). As Wettergren and Wikström (2014) have shown in their analysis of migration court cases concerning Somali asylum applicants in Sweden, the applied COI tends to be treated as factual information about the refugee-sending country against the background of which the narrative of the asylum applicant is judged as being either credible, or not credible. Wettergren and Wikström (2014) conclude that this process is marked by a 'narrow Western understanding of what political persecution means'; an understanding based on which the bureaucrats of a wealthy welfare state in the Global North assess claims made by asylum seekers from refugee-sending countries, i.e. mostly poorer countries in the Global South. In this context, the applied COI, the process of asylum adjudication, and the embedded power relations, can be conceptualised as 'epistemic violence' (Spivak, 1990). The purpose of this chapter is to investigate the power structures embedded in COI and Swedish asylum case adjudication, and to problematise the epistemic violence that these power structures can cause in the single legal case.

Adding to previous research on the topic in other national contexts than Sweden (e.g. van der Kist et al., 2019), I focus on COI as it is used in Swedish

migration courts. I draw on the semi-structured interviews with the decision-makers—lay judges (*nämndemän*)[1] and professional judges (*yrkesdomare*)—which I have been conducting from 2014 until 2022. More specifically, this chapter is mainly built on presenting and analysing excerpts from ten of these interviews,[2] which I audio-recorded with professional judges who decide in asylum cases either at the Migration Court of Appeal (MCA, in Stockholm) or at one of Sweden's four local Migration Courts (MCs, in Gothenburg, Luleå, Malmö, and Stockholm, see also Sveriges Domstolar, 2023).

The chapter proceeds as follows: I take my starting point in those publications which argue that Sweden's asylum system does not live up to its central claim of abiding by the rule of law (e.g. Asylarkivet, 2022; Elsrud et al., 2021; Lundberg and Neergaard, 2020). As I highlight this criticism, it is important to note that critical views of the asylum system are expressed not only by external (e.g. scholars) but also internal actors (e.g. judges, see Joormann, 2019). Then I take up Krause's (2021) tracing of the Eurocentric roots of the international refugee regime, which she characterises as 'colonial-ignorant'. Against this historical background, I present the chapter's conceptual framework of 'epistemic violence' (Spivak, 1990) and the analytical focus on COI within Swedish asylum case adjudication. Finally, in the analysis and discussion of the empirical data, I problematise the occurrence of epistemic violence understood as the ignoring, silencing, or denying, of knowledge claims made by the asylum applicant.

Contextualising the Research

With its roots in Article 14 of the 1948 Universal Declaration of Human Rights, the 1951 UN Refugee Convention and its 1967 Protocol are still the main sources that define the international refugee regime (Krause, 2021; McAdam, 2017; Mayblin, 2014; Barnett, 2002). Since 1997, the Dublin Regulation has been in place to regulate refugee reception in Europe. In 2001, Sweden joined the Common European Asylum System (CEAS). Together with other changes at the national, EU/regional, and broader international level, both 'Dublin' and CEAS are part of a development that has led to

[1] At the MCs, one professional judge decides together with three lay judges. If all three lay judges come to a consensus, their decision will prevail. That said, in one of my interviews it was stressed that, throughout the interviewed judge's career, it had happened only once that the judge 'wanted an acceptance and they [the lay judges] said rejection' (IT5).

[2] At the time of writing (spring 2023), I have completed the collection of all the interviews with professional judges. However, I am still transcribing and coding some of the interviews with lay judges. Therefore, I base the analysis in this chapter on a complete data set: ten interviews with professional judges, which I conducted for my doctoral research (Joormann, 2019).

a continuously stricter and stricter control of refugee migration to Europe, including Sweden (Giansanti et al., 2022).

Following the implementation of the current Aliens Act of 2005 (UtlL, 2005, p. 716), on 1 April 2006 the migration courts began with their work and the Swedish migration bureaucracy took its current form (Feijen, 2014). The decision to complement a new Aliens Act in 2006 with courts specialised in immigration law was motivated mainly by the following two reasons. From 1992 to 2005, the first-instance decisions taken by the SMA could be appealed to only one higher instance, the Alien Appeals Board (AAB, *Utlänningsnämden*, see Abiri, 2000). As it was argued when preparing the reform of 2005/06 (see also Johansson, 2005), replacing the AAB with courts of law would allow the system to benefit from an increased level of *rättssäkerhet*; a key term in the Swedish debate that encompasses claims to both 'legal certainty' and 'rule of law' (Joormann, 2019; see Banakar, 2015).[3] In contrast to the system that existed before 2006, the first and second legal instances would no longer operate under the Swedish Government as the highest instance. The reason for this procedural change was mainly motivated with the aim that 'asylum determination should be under judicial control' (Johannesson, 2017, p. 70). The second reason was more straightforward. In an interview given to journalists in 2005, the Migration Minister at the time provided an explanation of why the Swedish asylum system needed to change: 'As it looks today, the process effectively has no end because we have a system where the asylum seeker can file new applications again and again' (cited in Sydsvenskan, 2005).

The current system is designed to prevent rejected asylum seekers from re-applying. Once a Migration Court decides that an application is rejected, this tends to be the final decision (Josefsson, 2016). Meanwhile, the implementation of two new appeal instances has led to an improvement in terms of *rättssäkerhet*—if this Swedish keyword in the context is understood as a 'ceremonial version of bureaucratic justice' (Johannesson, 2017, p. 10). This being noted, the two new appeal instances (as courts of administrative law) provide the applicant with a less hierarchical bureaucratic setting compared with the entirely inquisitorial system operating until 2006, in which case officers, appeal board members and, in the last instance, the government decided (Joormann, 2020; 2019; see also Johannesson, 2017).

Reviewing the literature on asylum cases decided at Swedish courts, as exemplified above (Wettergren and Wikström, 2014), some studies focus on the credibility (see also Wikström and Stern, 2016; Beard and Noll, 2009)

[3] The arguably most literal translation of *rättssäkerhet* is 'legal certainty' (Joormann 2019), while the notion of 'rule of law' is needed to make sense of what *rättssäkerhet* means (Banakar 2015).

that is attributed (or not) to the asylum applicant. In another publication, Wikström (2015) contends that the 'epistemic (in)justice' (see Frickers, 2007) thus produced at the migration courts can be challenged by analysing the discursive construction of, for example, 'culture'. Wikström (2015) argues that legal categorisations can be de-constructed and that the problematisation of taken-for-granted terms (e.g. of 'culture') should be linked to the implicit assumptions of Western liberal law (see also Anderson, 2013). These assumptions have implications for the production and application of COI, as will be shown in the next section.

Country of Origin Information

Contributing to the international literature that analyses COI as it is used in asylum determination procedures (e.g. McDonald-Norman, 2017), this chapter focuses on COI in asylum case adjudication in Sweden (for research in Swedish, see e.g. Elsrud et al., 2021). The political situation in a certain place at a certain point in time is crucial when it comes to producing new—or compiling existing—COI. Tracing its origins, Rosset (2019, p. 1) defines COI as both a 'type of expert knowledge and a field of professional practices that has emerged since the late 1980s in the framework of West European and North American asylum administrations […]'. In Sweden, COI is primarily compiled by the Country Information Unit (*Landinformationsenheten*), which is often described as an independent unit of the SMA (Johannesson, 2017). The unit's employees compile existing or produce new COI by going on 'investigative trips'—as a judge I interviewed put it—to the country that they seek information on. This detail is significant, as van der Kist and collaborators identify links between this form of knowledge production and colonial power relations:

> Akin to colonial expertise, knowledge and rule are closely related in COI units as a 'set of practices' that collect and standardize information, measure, classify and calculate (supranote: Mitchell 2002, 4, 6). Critical observers often warn that these state knowledge practices disenfranchise the refugee through eliminating his or her voice in the process leading to the decision to deny or terminate protection (supranote: Chimni 2004, 61) […]. (van der Kist et al., 2019, p. 71)

The power relations represented within COI, in the form of knowledge produced in refugee-receiving countries about refugee-sending countries, indeed remind the observer of practices that Western researchers and other knowledge producers in the past applied when collecting information about

territories under European colonial rule (Duran, 2006). As it was also the case with knowledge claims made by colonialists in the past (Said, 1978), there are only unclear demands as to how objective COI is supposed to be, since it '[…] holds a curious middle ground between social science—with its claims to objectivity—and the production of practical policy knowledge' (van der Kist et al., 2019, p. 71). Against this background, the next section includes a short history of the coloniality of the international refugee regime, while focusing on the implications that this history has for the usage of COI in asylum cases.

The Colonial Origins of the International Refugee Regime

In several of the interview excerpts analysed in this chapter, the certainty of the provided information is questioned by the decision-makers because there is a lack of COI—or because there is not enough COI that is of sufficient quality and accessible to them. Regarding the general question of how certain the legal decision-making process in asylum cases can be, Krause (2021, p. 24) finds that the 'highly politicised and contested origin of "international" refugee law […] calls into question the liberal-positivist notion of legal neutrality, equality and objectivity, its fair, uniform and universal application worldwide'. She explains this as follows. When the Refugee Convention was prepared in 1950, there were discussions about the scope of the refugee definition, i.e. the question of who is to be considered a refugee. This discussion included criticism from de-colonised states. For instance, a Pakistani delegate 'stressed that "[h]is Government could not accept the definition" as it "covered European refugees only and completely ignored refugees from other parts of the world"' (Krause, 2021, p. 5). And while in 1950 a considerable part of the world was still under direct colonial rule, no colonised country aside from Cambodia and Laos (then still colonies, but already in the process of becoming independent) was invited to participate in the drafting of the Convention (Krause, 2021, p. 11).

The 1967 Protocol of the Convention added the possibility of non-Europeans being legally recognised as refugees. Notwithstanding this and more recent improvements, it is important to acknowledge that the views of newly de-colonised states were ignored, while countries under colonial rule were not at all represented when the international refugee regime was designed. It is in this context that Krause (2021, p. 5) characterises the process that led to the ratification of the Convention as marked by a 'colonial-ignorant' discourse: a discourse which also affects the present-day production

and application of COI in Western legal systems and European settings of asylum determination (van der Kist and Rosset, 2020; Rosset, 2019; van der Kist et al., 2019; Mayblin, 2014).

Epistemic Violence

Spivak's (1990) conceptualisation of 'epistemic violence' is useful to remain aware of the (post)colonial power relations between North and South, which also influence asylum determination in Sweden today (Asylarkivet, 2022; Elsrud et al., 2021; Wikström, 2015; Wettergren & Wikström, 2014). Epistemic violence can be defined as a process by which institutions in the Global North ignore, silence, or deny, knowledge claims made by actors from the Global South (see Spivak, 1990). Regarding asylum case adjudication, this primarily concerns information stated in the form of COI, produced or compiled by a migration bureaucracy in the Global North and used as the 'factual' background against which the information provided by the asylum applicant is 'checked'. The link between colonial power relations and the ignoring, silencing, or denying, of knowledge claims made by people seeking asylum from countries in the Global South also resonates with how Duran (2006) defines 'colonial bureaucratic violence'. That said, in another publication my co-authors and I have pointed out that, while colonial bureaucratic violence is characterised by 'the various mechanisms through which institutions alienate, isolate, and oppress Native people' (Abdelhady et al., 2020, pp. 14–15), we do not want to equate the violence under colonial rule with the bureaucratic violence that refugees encounter in contemporary welfare states.

Ethics and Methods of Data Analysis

The ethical considerations that guide this research centre on the strategy that the analysed excerpts from my interviews with the judges are referred to as anonymised data from conversations with the research participants (Bryman, 2012, pp. 129–155; see also Jaremba and Mak, 2014; Littig, 2009). It is important to note that my audio recordings and verbatim transcriptions of the interviews[4] do not include any personal information about individual asylum seekers, as the judges limited themselves to speaking about their

[4] I refer to them with a number for each interview transcript (IT), e.g. IT4, IT6, etc.

decision-making in general terms and without mentioning any confidential information about specific individuals. Nevertheless, also to protect the anonymity of the research participants, I treat all the gathered material as potentially sensitive information by anonymising it to the extent that neither the public nor the peers of the interviewed judges will be able to identify the source of the respective excerpt. In this way, I present, contextualise, and analyse the interviews by conducting a qualitative content analysis (Bryman, 2012).

Analysis

Acknowledging the position of power from which Swedish judges take top-down decisions that directly affect the lives of asylum applicants, it is relevant to examine those passages from the interviews in which the judges talk about the information that becomes central to their decisions. The findings of previous research on this topic, as summarised above, make it necessary to deepen the analytical debate on the question of how COI is incorporated into the decision-making process. To this end, it is crucial to reach a more detailed understanding of (a) what the Swedish asylum system considers to be valid COI, and (b) how this information can be processed by law's internal operations.

The Institutionalised Power Imbalance, and Epistemic Violence

> […] it is the [UK] Home Office […and] even the [US] State Department, and sometimes in fact the Swedish Foreign Office's reports, these can be taken into account, and there it is even like that, that, yes well, the thinking with the [2005] Aliens Act is after all that the legal parties should bring in COI which they think is needed, sort of. The SMA, for example, indeed provides the court with—and this, actually, only if we think that this country information, which they [the SMA] have come with, is too old, or it does not give enough information, or whatever it can be. Then we have ourselves taken in reports sort of and then one has probably looked in the first place at those. But, the legal parties, they can provide whatever they want, so whichever information they want. And then one indeed has to evaluate in light of, if one says, other reports [too], and see what one thinks is most likely. (IT1)

This interview excerpt deserves attention as it illustrates how the selection of information is impacted by the discretionary power of the decision-maker. It also demonstrates that there is a selection of COI that judges deem to be the 'most likely' representation of the reality in the respective country. And while the excerpt gives us an idea of the different sources of COI used at Swedish migrations courts, we get to know that judges have the authority to assess that the COI provided by the SMA can be 'too old, or it does not give enough information' (IT1). On the same issue, another judge explained:

> [Regarding COI coming from the Country Information Unit] I think that there it is of course clear, it is still the SMA that has done that, but there it is not done in just, well there it is after all not about deciding how the SMA should look at a certain question […]. Instead, there it is a civil servant, who has this as their job and who happens to be employed by the SMA, who has sort of trawled over all sources that can be thought of and who tries to obtain this [information …]. I am inclined to view this as ordinary country information, although they in fact come from the SMA there as well. (IT5)

As the judge stated, information coming from the Country Information Unit is compiled by employees of the SMA. The external observer's attention is drawn to the formulation 'happens to be' (IT5), which conveys the idea that it could be considered a coincidence that the SMA is also the employer of those people who are primarily responsible for producing and compiling COI. Actors within the Swedish migration bureaucracy tend to have the view that the Country Information Unit is a unit of the SMA that compiles COI in an independent fashion (Johannesson, 2017). In view of epistemic violence, this detail of the Swedish asylum system is at the heart of what I have called the institutionalised power imbalance (Joormann, 2019, p. 230) embedded in the encounter between the asylum applicant and the welfare state agency, which can be summarised as follows: Being the decision-making institution in the first legal instance, the SMA becomes one of the two legal parties in the second. However, when the SMA faces the applicant as the other legal party in a migration court (i.e. a court of administrative law), it is still a unit of the SMA that has produced and compiled most of the 'facts' about the applicant's country of origin. Furthermore, and in contrast to criminal law, where it is the prosecutor—and not the accused—who has the 'burden of proof', asylum cases depend not only on how convincing applicants can tell their story but also how well-read in immigration law and COI their lawyers are (Joormann, 2020, 2019; see also Johannesson, 2017). The threshold of how well certain information must be established for it to become 'probable'

(*sannolikt*, in Swedish legal terms)[5] is also conceived differently in asylum cases. It is lower in the sense that the 'benefit of the doubt',[6] as it has been re-defined for refugee law (see Sweeney 2009; Kagan, 2002), does not apply in the same way to the applicant in asylum cases as it does to the accused in criminal law (UNHCR, 2010). In turn, if experiences of danger, fear, persecution, and, consequently, the need for refugee protection, are denied as 'not probable', the respective process of asylum determination is marked not only by epistemic violence (see Spivak, 1990) but also entails the possibility of rejected applicants being deported and harmed by the physical violence that can occur during and/or after deportations.

Yet there is also internal criticism. Several of the judges I interviewed mentioned that there was a debate about the role of the highest instance (the MCA) regarding asylum cases, and COI in particular. As of today, the MCA's principal task is to produce legal guidance for the lower instances. This guidance, in the form of precedents, should clarify how relevant regulations, including national, EU/international statutes and case law, and other substantive and procedural rules, should be applied by the Swedish migration bureaucracy (UtlL, 2005, p. 716, Chapter 16, § 9–12). As one of the judges I interviewed put it, creating precedents is important 'so that it becomes a unitary application of the law' (IT4). However, the internal critics suggest, the MCA could also provide guidance concerning the validity of certain COI. For instance, the MCA could review an asylum case and focus on the question of whether the lower legal instances compiled the most nuanced and up-to-date COI. Even a report issued by the Swedish Government stresses the possibility to enlarge the mandate of the MCA in this way and concludes that such a reform could 'promote legal certainty, the rule of law, legal safety and security' (SOU, 2009, 56, p. 23).

There are further indications that there is room for improvement regarding the certainty of decision-making in Swedish asylum cases. A judge criticised not only COI, but also other information disseminated by the SMA:

[5] During the last eight years (2014–2022) of me conducting interviews with Swedish judges, I have asked several times about the notion of something being 'probable' (*sannolikt*). The judges explained that this referred to a binary of either 'probable' or 'not probable', rather than a scale or spectrum.

[6] Regarding asylum case adjudication in the context of the Swedish civil law tradition, it must be considered that '[i]n common law countries, the law of evidence relating to criminal prosecutions requires cases to be proved "beyond reasonable doubt". In civil claims, the law does not require this high standard; rather the adjudicator has to decide the case on a "balance of probabilities"' (UNHCR, 2010, p. 19).

> I can be quite critical about what [the SMA] sometimes writes […] among other things […] a legal instruction regarding credibility and reliability assessments, which is published online on *Lifos*.[7] And I have to say that this is difficult to get through because it is messy and it is—it is not unobjectionable, regarding neither form nor content, really. (IT6)

Another judge stated that:

> […] I have in fact been in the situation that, sometimes, I thought that I don't agree with this, what they [the SMA] write in their legal position. But they do include a good review of [legal] practice in an area, and from this practice, the SMA draws its own conclusion, which of course is usually something that one can agree with, but it is still an input from a legal party in some sense. (IT5)

The two interview excerpts add important aspects to the questioning of the quality of the information produced and disseminated by the SMA. When information is provided by the SMA—even though some internal actors might want to think of it as objective and neutral—a judge did not forget that this was 'still an input from a legal party in some sense' (IT5). In other words, the judge considered the possible interests behind the injection of information coming from the SMA. Important for the analysis in this chapter, in contrast to the COI produced and compiled by the SMA's Country Information Unit, the judge clearly identified a 'legal position' provided by the SMA as input from a legal party. In this way, taking into account the origin and possible interests behind the insertion of certain information into an asylum case, can be analysed as a form of top-down agency that counteracts the epistemic violence generated by the power position of the SMA; the welfare state agency which is not only one of the legal parties in court, but which also 'happens to be' (IT5) the institution whose Country Information Unit is the main producer of supposed-to-be objective knowledge about refugee-sending countries.

Language, Representation, and Epistemic Violence

A judge highlighted that, besides the quality of different pieces of information, the language in which they were written could be a crucial factor:

[7] *Lifos* calls itself the 'Swedish Centre for Country Information and Country Analysis in the Area of Migration' in English and is the main database for COI used in Sweden.

> […] there is an inequality in that respect between different, what should we say, source-compilers. [If] one can compile their sources in English, or for our part in Swedish, or in a Nordic language, one indeed lies far ahead of those who have done that in French, I would like to say. I know that there are [Swedish] jurists who are proficient in French and read decisions in French from the European Court and so on, I know that—but well, one can still generally say that the country information that is prepared in English or Swedish has an advantage in this respect. (IT6)

As a follow-up question, I asked whether it could be needed to consider, for example, information written in Japanese. With this spontaneous question, I not only made use of the advantages of conducting a semi-structured interview but also revealed some of the colonised thinking that apparently influences my way of seeing the world. Why did I ask about information written in Japanese and not, for example, Kurdish? In the split seconds of formulating a follow-up question, I must have found Japan as the first country that I could think of in the category of 'non-Western yet refugee-receiving'. The historical context of Japanese imperialism and the practice of paying for refugee resettlement in other countries rather than receiving asylum seekers in Japan (Tarumoto, 2019) was not on my mind at that moment. In response, the judge stated that there was no access to information in Japanese (or translations thereof) and added: 'Myself, I have tried to read in Dutch at some point, because I know a bit of German, but one cannot manage this' (IT6). Besides the ignoring (Spivak, 1990) of potentially relevant information in non-European languages, the expectation of being able to read COI in Norwegian was criticised by another judge:

> [S]wedish and English are indeed the most common, and then Norwegian. And I actually think that this is strange, country information that is not translated. Because we sit, well, apply very important text and this not in our mother tongue, and we are after all quite many judges who are not, sort of, entirely bilingual and it could indeed be worth to translate. I have, in fact, thought about this serval times, and sometimes Norwegian can be more difficult than English I can say, it is not so easy […] one should not be forced to sit and feel insecure. (IT8)

The judge continued, seemingly rather upset:

> Yes, I often think about this, I can become really angry that it has to be like this. It is a Swedish process, but we have to sit and read in English and decide about people's, well not life and death, but sometimes actually, in another

> language than our mother tongue […] In fact, I think that this is something that someone could do something about. (IT8)

In addition to this rather straightforward demand for change, the judge not only mentioned the problem that there were not (professional) enough translations of (potentially) important information in other languages than Swedish but also identified shortcomings regarding the production of COI—sometimes undertaken by Swedish civil servants who set out on trips to refugee-sending countries:

> […] certain country information, after all, can be based on what two people out in the forest state. Yes, a bit like that, not really. But in countries about which it is difficult to get information, country information can at least partially be built on quite weak observations, but this is what is accessible, quite simply. One has maybe collected, sort of, what many say, field workers in Africa who have come across people, sort of. (IT8)

Important to acknowledge when looking more closely at this excerpt about 'what is accessible' is the implicit omission—and, thus, the silencing (Spivak, 1990)—of the information about their countries of origin that asylum applicants themselves can provide Swedish migration courts with. Beyond Sweden, Rosset (2019, p. 36) shows in his study on the use of COI that the Swiss bureaucracy also produces COI about Somalia. Having analysed COI in the contexts of several European welfare states and their migration bureaucracies, Rosset (2019) finds that European countries in general tend to prefer their bureaucratic knowledge production rather than the information provided by the asylum applicant.

Several of the judges I interviewed identified significant shortcomings regarding the practice of Swedish bureaucrats travelling to refugee-sending countries in order to produce COI. Because of such shortcomings, the state employees who went on these trips sometimes applied questionable strategies, as one judge described it: '[O]ne does try to compensate for this by cutting together several such fragments in such a case, maybe from different countries' (IT8). Amplifying this already stark description of how COI could be produced in practice, the judge became more explicit when criticising the problem of not being able to gain enough knowledge about certain countries:

> […] Somalia is a quite good example, where one has, at least previously, been doing such investigative trips which—sort of, there is not much more country information than [from when] the SMA did this trip and came across people

> who said this and that. It is indeed difficult when there is not so much foreign representation in a country, then one does not get to know that much. (IT8)

The judge continued, about Somalia, and about the lack of representation:

> [T]his investigative trip which the SMA did […]. There was, after all, almost no one who had lived and worked in Somalia. It is very difficult to evaluate a country where one is not inside to observe and see. Then it indeed becomes like that, easily, yes one has to take the information that is there. (IT8)

Reading the two quotes above, it is important to keep in mind that such statements about 'information that is there' refer to COI that Swedish judges consider as credible (enough) regarding its sources and accessible (enough) regarding its language. By contrast, information that is potentially relevant, but deemed not to be credible and accessible enough, is in this sense 'not there'. In consequence, if relevant information provided by the asylum applicant is ignored, silenced, or denied, this is another example of epistemic violence (see Spivak, 1990).

Discussion of Key Findings

A government report (SOU, 2009, p. 56) as well as research conducted by social scientists and legal scholars (e.g. Asylarkivet, 2022; Elsrud et al., 2021; Johannesson, 2017; Wikström and Stern, 2016; Wettergren and Wikström, 2014; Lundberg, 2011) criticise the Swedish migration bureaucracy, its asylum determination procedure, and its handling of COI. Given the lack of access to well-informed, in-depth knowledge about refugee-sending countries, as problematised by several of the judges whom I have quoted in this chapter, the Swedish asylum system tries to compensate by letting them use COI produced in other Nordic countries, the US, or UK. A consequence of this practice is that Swedish judges regularly 'apply very important text' written in languages that are not their 'mother tongue', which leads to the problem they can 'feel insecure', as it was expressed in one of the interview excerpts analysed above. Several of the judges quoted in this chapter also identified a lack of guidance regarding COI and the crucial question of how to assess the situation in refugee-sending countries. To re-visit what was stated by one of them: When a judge does not have much more information to go on than what was collected by employees of the SMA who went to Somalia and 'came across people who said this and that', it becomes difficult to ensure the certainty of law's internal operations and the uniformity in legal

decision-making. In extreme cases of building decisions on clearly questionable information, the Swedish asylum system cannot truly claim that it abides by the rule of law (see also Elsrud et al., 2021).

The problem that most COI is either produced or complied with by bureaucrats adds to the power imbalance between the migration bureaucracy of a wealthy welfare state and asylum applicants from refugee-sending countries (van der Kist and Rosset, 2020). This issue is at the core of the institutionalised power imbalance (Joormann, 2019) that can cause epistemic violence (Spivak, 1990) in the single legal case. The identification of the respective power relations—between people seeking asylum from the Global South and decision-makers in the Global North—leads the observer to detect parallels with the colonial bureaucratic violence of earlier historical periods and other geographical contexts (van der Kist et al., 2019; see Duran, 2006; Said, 1978).

Given the findings summarised above, Krause (2021, p. 24) aptly highlights that the history of the international refugee regime '[…] calls into question the liberal-positivist notion of legal neutrality, equality and objectivity, its fair, uniform and universal application worldwide'. Notwithstanding the improvements that have taken place in refugee law since 1951—for example, the recognition of gender-based violence and the persecution of sexual minorities as legally valid grounds to seek asylum (McAdam, 2017)—the impacts of colonial power relations between actors from the North and South are still influential (Mayblin, 2014). In a word, '[…] colonialism is *manifest* in the western vision of international refugee law […]' (Odhiambo-Abuya cited in Krause, 2021, p. 24, emphasis added). Conceptually speaking, Spivak's (1990) notion of 'epistemic violence' has proven to be useful in analysing (1) the (post)colonial power relations (between Global North and Global South, decision-makers and applicants), and (2) the silencing, ignoring, or denying, of knowledge claims made by the applicant.

Conclusion

Focusing on the adjudication of asylum cases in Sweden, this chapter shows that epistemic violence (Spivak, 1990) takes place when asylum seekers encounter the migration bureaucracy of a wealthy welfare state in the Global North (beyond the Swedish context, see e.g. van der Kist and Rosset, 2020). My interviews with judges at Sweden's migration courts include several points of criticism concerning the organisation, origin, and quality, as well as the language, of the country of origin information (COI) that is applied when

they adjudicate. This information is of crucial importance for the lives of vulnerable people who seek refugee protection and their access to certain (and currently changing) social rights granted by the Swedish welfare state (Giansanti et al., 2022). Given the possibility of refugees gaining the legal right to reside in Sweden and, thus, the social right to access welfare provision, with its focus on COI, this chapter enables the reader to question the asylum system's claims that it guarantees legal certainty and abides by the rule of law (see also Elsrud et al., 2021).

Acknowledgements I want to thank the Swedish Research Council for supporting the writing of this chapter with funding (International Postdoc Grant) and the following colleagues for their input on drafts at different stages of the writing process: Dalia Abdelhady, Eda Farsakoglu, Marta Kolankiewicz, Annika Lindberg, Anna Lundberg, Öncel Naldemirci, and John Woodlock. Moreover, I am grateful for the comments from the workshop participants of the FRAMLAW book project and from the colleagues at the University of Copenhagen's Centre for Advanced Migration Studies Centre (AMIS) and Centre of Excellence for Global Mobility Law (MOBILE).

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Part III

Citizens' Mobilisation of Social Rights

8

Access to Justice and Social Rights for Victims of Trafficking and Labour Exploitation in Sweden

Isabel Schoultz and Polina Smiragina-Ingelström

Introduction

In February 2019 one of Sweden's leading investigative television programmes, *Uppdrag granskning*, presented revelations about employees at one of Sweden's largest nail salon chains, who testified to slave-like working conditions involving long working days, six days a week, with no overtime pay or vacation. The company had a collective agreement with the union and paid salaries accordingly, but the employees were forced to pay back large parts of their salary every month. When the programme aired, two of the employees had already contacted *Handels*—the Commercial Employees' Union. After contacting the union, the employees were informed by their employer that they had been suspended from work, and they experienced pressure and threats from the employer. The union entered into negotiations with the company but since no settlement was reached, the union sued the company in the Labour Court for almost SEK 4 million. Following court-led negotiations, the parties arrived at a settlement by the end of 2019, which was affirmed by the court, whereby the company agreed to pay SEK 185,000 and 135,000, respectively to the two workers in salary, holiday pay and financial damages (AD 54/19).

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_8

Simultaneously, the Swedish Migration Agency reported the case to the Police as human trafficking, after having received an email from one of the employees who expressed fears about losing her work permit after being suspended from work as a result of the negotiations with the union. Remarkably, the case went all the way from a police report to a criminal investigation and then a criminal court hearing. This is unusual because most Swedish police investigations focused on human trafficking for forced labour do not result in prosecution (Schoultz and Muhire, 2023).

In May 2022, the court acquitted the nail salon owner of human trafficking and human exploitation,[1] but he was convicted of fraud for tricking the two workers into paying USD 25,000 to get a job in Sweden. Part of the sum was stated to be the debt that the two employees were forced to pay back from their salary. The employer was sentenced to a conditional sentence combined with a day fine (80 days at 260 SEK per day) and was forced to pay damages of SEK 120,000 to one victim and USD 5,000 to the other, plus interest (Case nr: B 6903-18). The case of the nail salon raises the question of access to both justice and social rights. The union and the Migration Agency transformed the employees' experienced injury to legal cases, both civil and criminal. In line with Cappelletti and Garth's (1978) description of 'barriers to accessing justice' (costs of litigation, time and party capability), two factors are most likely to have been of decisive importance in this case. First, by receiving support from the union, the employees did not risk having to pay the costs of litigation. Second, but no less important, was the union's competence in recognising and pursuing the claim and their experience of the judicial system. In the end, two of the employees at this company, who were possibly not alone in working under these conditions, received financial compensation: in the civil case for lost salary, and in the criminal case for the injury they had suffered. While in many ways the victims received justice, their human trafficking case was dismissed, and by extension their claims as trafficking victims. In practice, the temporary right to remain in Sweden (which is linked to the criminal investigation and the court hearing) ends after the trial, regardless of the outcome.[2] In other words, the victim's access to social rights in these cases is first and foremost conditioned by the right to stay in Sweden.

[1] Since the human exploitation legislation came into force in 2018, it was only applicable during the last six months of the period covered by the indictment.

[2] If an individual is not granted asylum based on the need for immediate protection, a human trafficking conviction does not in and of itself provide grounds for the victim to be granted asylum (Gender Equality Agency, 2019).

Victims of trafficking and labour exploitation (especially non-citizens) are particularly vulnerable as a result of their marginalised position: related to the language barrier, limited awareness of rights, where to seek help, potential dependency and/or indebtedness to the employer, and lack of viable alternatives (Ollus, 2016). The fact that undocumented migrants are 'deportable' creates an exceedingly precarious situation (De Genova, 2004; Sager and Öberg, 2017; Selberg, 2016). People's capacity to seek assistance and justice are linked to the realisation of social rights, including health, housing and employment opportunities (Curran and Noone, 2008).

Engaging with the notion of victimisation as an interactional process, this chapter examines how victims of human trafficking and other forms of labour exploitation can seek help and gain access to social rights and justice, taking its point of departure in the role of professionals (government agents, social services, unions and NGOs) as facilitators. When referring to victims, we include victims of all forms of human trafficking and other forms of labour exploitation, regardless of whether they are formally identified as victims. Labour exploitation can be conceptualised as existing along a continuum, ranging from trafficking for forced labour to less severe forms of exploitation and violations of labour law (Andrees, 2008; Ollus, 2016; Skrivankova, 2010). This chapter will examine how access to justice and to social rights for victims of human trafficking and other forms of labour exploitation is closely linked to the victim identification process, the gendered nature of assistance provided by state agencies and NGOs and the overall migration regime.

International and National Legal Frameworks and Policies

The EU has established a minimum standard regarding the rights, support and protection of crime victims (Directive 2012/29/EU: 2), highlighting the importance of 'appropriate support to facilitate […] recovery' and provide victims 'with sufficient access to justice'. The directive emphasises that particularly vulnerable populations, such as victims of human trafficking and individuals who were victimised outside their home country, should be offered specialist support and legal protection.

Sweden introduced its anti-trafficking legislation in 2002, shortly after signing the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000) (hereafter referred to as the Palermo Protocol). While the Palermo Protocol provides the definition of a crime that includes a broad spectrum of different forms of

exploitation, the initial focus of the Swedish anti-trafficking law focused exclusively on the prohibition of sexual forms of trafficking. Amendments to include trafficking for other purposes (including, but not limited to, forms of labour exploitation) were introduced in 2004 (CC 4:1a). This brought the Swedish anti-trafficking commitments into line with the country's international obligations. The other two specialist treaties that bind Sweden to prohibit all forms of trafficking and protect victims are the Council of Europe Convention on Action against Trafficking in Persons (2005) and EU Directive 2011/36/EU.

Human trafficking is a human-induced crime of intentional nature (Janoff-Bulman, 1985), which involves the perpetrator(s) using a variety of means to profit from exploiting the labour or services of vulnerable individuals.[3] The forms of labour and services covered by the Swedish Criminal Code (CC) include exploitation for 'sexual purposes, the removal of organs, military service, forced labour or other activities in a situation that places that person in distress' (CC 4:1a). The threshold for what constitutes human trafficking is high, limiting the application of victim status to groups who have suffered a major degree of harm (including violence and deprivation of freedom) (see for example Åström, 2014).

Sweden has received continuous criticism from the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) for its limited efforts to address human trafficking for the purpose of labour exploitation and trafficking for forced begging and forced criminality (GRETA, 2014, 2018). In 2018, Sweden introduced the human exploitation provision (CC 4:1b) as a subsidiary to the human trafficking legislation. This provision covers forced labour and begging, and also labour under manifestly unreasonable conditions[4] (CC 4:1b).

Being identified as a victim of human trafficking or human exploitation should entitle individuals to immediate protection and assistance by social services, as well as grant access to healthcare and assistance by specialised municipal and regional coordinators.[5] For short-term assistance, victims who lack a residence and work permit in Sweden should be granted a 30-day

[3] See the UN Palermo Protocol (2000) for a full definition.

[4] According to the Government Bill (Proposition, 2017/18:123), labour under manifestly unreasonable conditions can include low salary or unpaid wages, unreasonably long working hours, exposure to unacceptable safety risks, unreasonably high charges for travel (to Sweden), food or accommodation deducted from earned wages. Importantly, the decision as to the nature of the conditions of work is based on an overall assessment of the circumstances of the individual case.

[5] Regional coordinators act as expert support in cases that involve suspected trafficking or exploitation. They are based in the social services in 7 regions and are also funded by the Swedish Gender Equality Agency and the County Administrative Boards.

reflection period in accordance with the Aliens Act (5:15), which allows victims to temporarily remain in Sweden. During this period, they are entitled to different victim assistance rights such as healthcare, social services and injured party counsel (Social Services Act, 2001:453). The permit to stay may be prolonged for a 6-month period or longer if it is necessary for a criminal investigation or main hearing to be carried out and if the victim is willing to cooperate with the authorities and has broken all ties with the persons who are suspected of the offences at issue (Aliens Act, 5:15).

The Swedish National Referral Mechanism divides the support and protection into 6 steps: identification, emergency protection (e.g. the 30-day reflection period, secure accommodation, emergency healthcare), initial support (e.g. injured party counsel if a police report has been filed), long-term support (which involves the temporary residence permit of at least 6 months during the criminal investigation and trial, and support offered by the social services), legal proceedings (before and during trial) and safe return (Gender Equality Agency, 2019). When it comes to social rights, there is a big difference between labour migrants from within and outside of the EU. While all victims of human trafficking in Sweden legally have the same right to receive assistance irrespective of their immigration status (CoE Convention), in practice some victim groups are at a disadvantage, particularly those among asylum seekers and persons in detention centres (GRETA, 2018). Moreover, while the unconditional free movement of EU citizens within EU states is limited to three months, EU workers or self-employed EU citizens have the right to reside longer and have access to social rights (Directive 2004/38/EC). In practice, however, EU citizens may not be granted these rights if they are precariously employed (Schweyher, 2021).

State of the Art: Victim Identification and Access to Rights

Previous research illuminates various reasons for the failure to identify and provide access to rights for victims of human trafficking and labour exploitation. Farrell et al. (2014) identify three major barriers to the identification and investigation of human trafficking: an uncertain legal environment, institutional and attitudinal barriers. These barriers have also been mirrored in other studies focused on the identification (Smiragina-Ingelström, 2020). Åström (2014) has noted that the Swedish legislation is based on international instruments whose primary purpose is to protect national security (i.e. the Palermo Protocol), which thus deprioritises the needs and interests of the victims

(see also Gallagher, 2010, 2015; Gallagher and Skrivankova, 2016). Åström concluded that few victims of human trafficking in Sweden are formally identified, and that those who are identified mainly fall within the sex trafficking category. Consequently, exploited migrant men are typically seen as illegal migrants rather than victims (Åström, 2014). A similar pattern has also been observed outside Scandinavia (Smiragina-Ingelström, 2020).

Moreover, international scholarship has drawn attention to the low number of prosecutions for human trafficking on a global scale, despite the availability of resources and the attention focused on the multifaceted nature and complexities of this crime (Doyle et al., 2019; Doyle et al., 2019; Gallagher, 2010, 2015; Gallagher and Skrivankova, 2016; Farrell et al., 2014; Matos et al. 2019; Matte Guilmain and Hanley 2021; McDonald, 2014). Previous research has noted challenges associated with the identification, investigation and prosecution of human trafficking. For example, a failure on the part of the police to identify victims (Farrell et al., 2019, 2014; Farrell et al., 2010).

Moreover, the priorities of state actors and NGOs are different; while the approach of the former is to prosecute, the latter focus on victims' human rights (Skilbrei, 2012). From the perspective of international law, these two lines of action should be compatible in the effort to combat human trafficking, but they may be in conflict (Skilbrei, 2012). On the other hand, NGOs that assist victims of labour exploitation 'tend to have a lower threshold for defining trafficking than do the police and courts' (Skilbrei, 2012, p. 216), which may manifest itself in cases reported to the police by civil society actors leading to no charges being brought (see Bjelland, 2016). Spanger and Hvalkof (2020) have argued that the primacy of migration law and criminal law discourses lead authorities to prioritise the question of the workers' migrant status over the issue of their potential exploitation.

Conceptual Framework: Victimisation as Interactional Process and Access to Justice

This chapter follows a constructivist stance (Strobl, 2004), whereby victimisation is understood as an interactional process (Holstein and Miller, 1990) via which victim status is obtained. Victim status is assigned collectively (by the victim, the victimiser and society as a whole) by means of social interaction and interpretations of victimhood (ibid.). This impacts how and who receives a legitimate victim status (and who does not), while also impacting the availability of social and legal redress, which is based on how harmful the

victimisation is perceived to be. Seeking and gaining access to assistance and justice relies on this interactional process and is dependent on victim identification. While the assignment of victim status may be rejected by others when the victim's personal characteristics do not align with the social construction of victimhood (Strobl, 2010, p. 6), victims may also themselves reject the status of a victim (Van Dijk 2009; Fohring 2018) and by extension decline post-trafficking assistance (Brunovskis and Surtees, 2008).

The most marginalised victims tend to have the least power and knowledge to deal with the aftermath of victimisation which is central to the issue of accountability for victims of crime (Goodey, 2008). Thus, the interactional process of victimisation is also linked to the individual's access to justice, which is understood here as the presence of equal opportunities for all to demand their rights (Cappelletti and Garth, 1978). Rights are temporal and fluid, however (see Galanter, 2010, p. 124), and access to justice is highly dependent on the identification and recognition of victim status as well as on having permission to stay in the country.

Since there is no established system for assigning a person the status of a victim of trafficking and human exploitation in Sweden until a criminal investigation has been initiated, actors such as the police, immigration officers, labour inspectors and trade union representatives all participate in a process of legal categorisation that differentiates between 'trafficking victims', 'exploited workers' and 'illegal migrants' (see Strauss, 2016, p. 152). Depending on the categorisation, the individual will be recognised either as a victim with certain legal protections and social rights or as a deportable migrant (Plambech, 2014).

Methods

The data employed in this chapter have been drawn from two different research projects and are based on a combination of different sources: participant observations, semi-structured interviews and a documentary analysis of international and national legal and policy frameworks and court judgements and settlements.

The first project investigated the post-trafficking needs and help-seeking behaviour of trafficked victims.[6] The data were collected between October 2021 and April 2022. The provision of services was observed across two sites,

[6] 'Negotiating care, post-trafficking needs and gender in understanding help-seeking behavior of trafficked victims: a case study of Finland and Sweden', funded by The Nordic Research Council for Criminology (NSfK), led by Polina Smiragina-Ingelström.

specifically at one shelter and one police station. This was complemented with observations of the locations in Sweden in which victims were detected by the police (specifically areas where victims were exploited for the purpose of begging). A total of fourteen interviews were conducted in Sweden: with one female victim of human trafficking, nine representatives of governmental bodies (four police officers, one prosecutor, two representatives from the National Coordination Office Against Prostitution and Trafficking in Human Beings at the Gender Equality Agency and two regional coordinators), as well as four representatives of NGOs involved in direct service provision to victims of human trafficking.

The second project used semi-structured interviews with practitioners from government agencies, trade unions and non-governmental agencies to investigate access to justice among victims of labour exploitation.[7] The interviews, 27 in total, were conducted between May 2021 and June 2022, some in person but the majority via video calls. During this period, we[8] also visited three unions/semi-union organisations[9] (SAC—the Central Organisation of the Workers of Sweden, the Trade Union Centre for Undocumented Migrant Workers and Husby Arbetarcentrum), which resulted in several informal conversations with representatives and observations made during meetings with migrant workers. In addition, for the purpose of this chapter we also present several illustrative examples from legal cases and settlements that were mentioned in the interviews.

A limitation of these data sets is the absence of the perspective of the victims themselves. While the first data set includes one interview with a female victim of human trafficking, self-descriptions of the experiences of those who have been victimised are lacking. This chapter instead takes its point of departure in victimisation as an interactional process and examines how victims of human trafficking and other forms of labour exploitation can seek help and gain access to social rights and justice focusing on the role of professionals (social services, unions and NGOs) as facilitators.

[7] 'Arbetet mot arbetskraftsexploatering i Sverige - framställningen av offer och tillgången till rättvisa', funded by the Swedish Crime Victim Authority led by Isabel Schoultz.

[8] In the project, Heraclitos Muhire worked as a research assistant and took part in the interviews and visits to the unions and semi-unions. He is also responsible for transcribing most of the interviews and coding them.

[9] The term semi-union organisations refers to NGOs that act as substitutes for official unions, see Froissart (2011).

Victim Identification by State Institutions

Being identified as a victim, and thus accessing certain state-guaranteed rights, not only requires active self-advocacy by the victim but also active victim identification by state institutions (Strobl, 2004). Nordic scholars have demonstrated that most anti-trafficking efforts have been focused on women who are trafficked into prostitution (Heber, 2018; Skilbrei, 2012; Åström, 2014), and recent statistics from the Gender Equality Agency (2022) show that most of the victims of human trafficking identified by state institutions are women who have been exploited for sexual purposes. Reasons for this focus are related to the political and social context within which human trafficking is being problematised as a social issue in Sweden. Prostitution and trafficking in human beings 'receive particular attention in the Swedish strategy for the elimination of men's violence against women',[10] thus establishing the female victim as the primary concern and equating the practice of prostitution with human trafficking (see, for example, Heber, 2018).

GRETA's (2014, 2018) criticism of Sweden's passive role in looking for victims of non-sexual forms of trafficking was confirmed in our interviews with state institutions. For example, when asked about the forms of exploitation the police have come across, one officer from a human trafficking unit responded:

> Not organs, military service. Haven't looked for it and haven't found it. Mainly sexual exploitation… working against and actively looking for. (Police)

Importantly, when the human trafficking police unit was formed at the beginning of 2000s, trafficking was legally framed from the perspective of sexual exploitation. Today, the police continue to identify many cases of sex trafficking, but also work more proactively with a focus on forced begging and labour exploitation (GRETA, 2018).

Bearing this in mind, the image of the ideal victim of human trafficking is constructed through social interactions and understandings of the way the victim role should be performed (Holstein and Miller, 1990; Strobl, 2010). Referring to victims whose characteristics do not correspond to the social constructions of the ideal victim, one of the regional coordinators explained:

> [They are] not ideal victims of crime, especially not when trafficked for other reasons than sexual, so the social services don't want to deal with them, they

[10] https://swedishgenderequalityagency.se/, date accessed: 2023-01-05.

> can't relate to their experience as being victimising. […] not everyone feels or understands that they are victims. (Regional coordinator)

Another problem with the identification of victims of labour exploitation involves the conditions under which the Swedish authorities meet potential victims. The Swedish Work Environment Authority, the Swedish Tax Agency, the Police Authority, and the regional coordinators when applicable, participate in joint workplace inspections. While interviewees from these authorities described the exploitive working and living conditions, they encounter during multi-agency workplace inspections, they identify few victims. One regional coordinator, explained:

> Then it's a difficult situation to storm into a building or restaurant when the employer is standing five metres away and you're terrified because you might know you're being exploited but you're still afraid of losing your job or you're afraid of the employer being threatening, you're afraid of being thrown out of the country. It's all these things that make you maybe not dare to talk about your situation there and then at an inspection. (Regional coordinator)

During these inspections, exploited migrant workers risk being identified as offenders (in breach of immigration law) rather than victims of crime, since it is usually the Border Police who participate in the inspections, and their primary task, as one police officer explained, is 'to make sure that those who are going to be in the country are going to be in the country and those who have a deportation order are going to be deported, that's their primary mission'.

The nature of the identification process highlights the way that victim status is acquired through social interaction and influenced by the overall understanding of the event by the various social actors involved (Holstein and Miller, 1990). As described earlier, for victims of trafficking and human exploitation, there are legal rights allowing them to stay in Sweden for short periods. A 30-day reflection period is provided for recovery and to decide whether cooperating with the criminal investigation is in the victim's interest. A 6-month residence permit can be offered if a criminal investigation is initiated, and the victim needs to stay in the country. In practice, however, these rights have been confused:

> Sometimes it has been the case that the police would like to open a criminal investigation in order to apply for a reflection period and then the whole thing falls apart a bit. Because the idea is that the victim should not have to talk to the police during the reflection period. (Regional coordinator)

Until recently, only the police or the prosecutor could apply to the Migration Agency for a reflection period, which has been criticised by GRETA (2014, 2018). In August 2022, municipal social welfare committees were given the authority to formally identify victims and apply for a reflection period (Aliens Act, 5:15). The previous system has in practice created a conditionality, whereby participation in the criminal process is perceived as granting access to assistance, which research has identified as having a harmful effect on victims (Skilbrei, 2012).

Moreover, the extensive assistance associated with the 6-month temporary residence period is not guaranteed. For example, victims' access to state-run accommodation can be discontinued directly upon the completion of court proceedings. One regional coordinator described an instance in which a formally identified male victim of human trafficking was offered accommodation via the social welfare committee. However, upon returning to this temporary accommodation following the final court day, the victim was informed that he was no longer eligible for accommodation as the court process had now been completed. The victim was later spotted by the regional coordinator on the street, picking through garbage bins.

Further, these gaps are not only found in relation to labour exploitation, identification is also problematic in other forms of trafficking. One female victim of sex trafficking—Esther (name changed), recollected never having been asked about her needs when she was interviewed by the authorities and having felt obliged to provide information to the police about her victimisation in order to obtain protection: 'The help they offered—give me some information, help us get these people and we will give you protection and documentation to stay'. Esther remembered her interviews as 'terrible […] destroying me more than saving' and said:

> [I received] lots of questions! Had to tell [them] everything! [...] detailed descriptions of exploitation. I had to talk about things I had forced myself to forget [...] Interviews went on for hours, sometimes until I broke down. (Esther)

Esther remembered being offered psychological assistance but recalled that the police did not have time to wait for the evaluation. The police officers working in the human trafficking unit confirmed the use of lengthy interviews and could recall instances in which victims had become emotional.[11] But they also mentioned the problems associated with establishing trust,

[11] See also Plambech (2014) for a similar observation of 'interrogation' techniques in the Danish context.

which is key to a successful investigation. However, according to the police, there is a 'threshold of establishing trust—being on the case right away', which explains the sense of urgency associated with wanting to interview the victims as soon as possible. There is an evident gap in terms of successful victim identification and, by extension, access to social rights, which is grounded both in the exclusionary practices of the migration regime and the priorities associated with criminal investigations and the support offered to victims. Moreover, studies have shown that providing support to victims contributes to their willingness to participate in police investigations (McSherry and Cullen, 2007).

Mobilising Rights Through NGOs

NGOs are often the primary points of entry for accessing social rights among victims of human trafficking and various forms of labour exploitation, since these organisations provide victims with the opportunity to seek assistance in confidence and without being bound by (perceived) obligations to participate in the criminal justice process or fearing deportation. One NGO representative explained the process and different categories of 'clients' (potential victims of labour exploitation). The first category comprised victims who were already being assisted by a government institution and who were referred to NGOs for additional support:

> As far as labour exploitation specifically is concerned, there are mainly two categories of clients: […] individuals who have […] made a police report so that they have contact with the formal support and protection systems and have usually been granted a temporary residence permit to participate in a criminal investigation, and then it is usually the regional coordinators who get in touch, and then it may be that there is a need for additional support; then they have injured party counsel, the legal pieces are usually in place then. But then it's more about the regional coordinators feeling that I don't have the resources or time to support this particular individual to the extent that I see would be needed. (NGO)

The second category involves victims who have not yet been formally identified or assisted and/or who would like to explore the possibilities available to them:

> […] it's those who come directly who may not have thought in terms of exploitation, but either heard about us themselves or been referred by someone

> else with whom they've had contact. It's very much about exploratory conversations, trying to figure out—well, what is your situation here? And being able to talk to the criminal lawyer [associated with the NGO] at a very early stage, before they have even decided whether they want to make a report [to the police]. Just to get information about how—yes, but what does the legislation look like, what rights come with being identified as a victim of crime and so on, and to be able to decide about how they want to proceed. (NGO)

When it comes to gender, masculine stereotypes have been identified as an obstacle to identification and by extension to the successful provision of assistance to male victims (Rosenberg, 2010), since victim identification is reliant on an interactional process, in which factors such as '[t]he assumed breadwinner role and socially ascribed masculine qualities of strength and control contradict the victim status' (Smiragina-Ingelström, 2020, p. 29). Gender also plays a crucial role in terms of victim needs and service availability. For example, the forms and quality of support and the provision of housing are often based on the sex of the victim (Surtees, 2008a, 2008b; Rosenberg, 2010; Hebert, 2016). Sweden is no exception to this trend.

While the direct service providers who were interviewed explicitly stated that victims of trafficking in Sweden are of varying gender and sexuality, and while assistance has been both offered and received by a range of victim categories, the Swedish approach to assistance is framed along gendered lines, with post-trafficking care being tailored primarily towards female victims of sexual exploitation. As one police officer put it, it is 'very difficult to place men in safehouses […], the assistance system is only made up for women'.

As a rule, female victims are placed in specialised accommodation for victims of violence against women and/or human trafficking. Specialised shelters for male victims of human trafficking are currently unavailable in Sweden, so they are typically placed in temporary accommodation associated with homelessness and substance abuse. The police explained that when they identified male victims, they 'had to place [them in] accommodation for the homeless'. This was also confirmed by one respondent from the Gender Equality Agency and by NGO representatives.

One NGO representative expressed that this trend can be explained by the fact that male victims do not require the same level of security as female victims, because they are not subjected to the same level of violence or threats of violence as female victims of sexual exploitation:

> Those who are exposed to labour exploitation are not under threat to the extent that you might need sheltered accommodation with a very high degree of security. […] they are threatened in such a way that they should not remain in their

> workplace, but there is no one looking for them in that way. And then they can be in these hostels that are still protected but not in the way that it might be when you're a victim of violence in a close relationship. (NGO)

Another essential element of post-trafficking assistance involves psychological support. This is one of the central elements in post-trafficking recovery included in all relevant international legal frameworks and by extension also in Swedish policies (Gender Equality Agency, 2019). Aside from psychological care in a more conventional clinical context, some victims are also offered alternative avenues to emotional recovery. For example, female victims provided with assistance in Sweden are offered a variety of paths to emotional recovery, such as for example art therapy (painting and theatre) and support groups where women can share their past experiences, learn about the experiences of others, and build trust without being judged.

When it comes to the recovery of male victims of trafficking or labour exploitation in Sweden, this form of emotional support is lacking. Similarly, Swedish scholarship on the provision of care to individuals who have suffered emotional trauma has shown that most art therapy is tailored to women and is less likely to be offered to or sought by men (Lindblad, 2021).

A few direct service providers who have encountered male victims in their line of work (regional coordinators and NGOs) expressed that help-seeking is more challenging for male victims due to the lack of available services, a lack of knowledge about these services and self-misidentification. However, most of the participants in this study, and especially those working in law enforcement, have found that asking for help is equally difficult for men and women. This could perhaps also be attributed to the different contexts in which victims seek help: in a care setting or at a police station.

From an access to justice perspective, NGOs play a crucial role for victims by strengthening them and providing knowledge about their rights (see Goodey, 2008), while at the same time also providing them with support and assistance. Still, the support and assistance offered to victims of human trafficking and other forms of labour exploitation seems to be gendered, with less support today being provided to male victims.

Unions—A Gateway to Justice

One area of civil society that plays a significant role in the mobilisation of the rights of victims of labour exploitation in Sweden is the trade unions. Historically, there has been a reluctance to organise undocumented migrants in the large well-established Swedish blue-collar workers' unions (Moksnes,

2016; Selberg and Gunneflo, 2010; Neergaard, 2015). Recently, however, some trade unions and semi-union organisations in Sweden have developed strategies to mobilise the rights of migrant workers, including the adoption of immediate legal practices, everyday negotiations with employers and the pursuit of court litigation.

The Stockholm division of the SAC, a small independent anarcho-syndicalist union, decided in 2020 to take on cases involving non-members, if they joined the union. This is not the first time that the SAC has organised migrant workers (Mešić, 2017). The most recent initiative seems to have affected both the number of members and the methods employed. The union helps to develop migrant workers' awareness of their (labour) rights, provides a platform for collective rights claiming actions, offers individual legal aid to migrant workers and takes direct legal action. Over the last couple of years, the union has developed its experience and skills, and has formulated new strategies to reach migrant workers and claim their rights, although a large part of this work constitutes a traditional area of labour union activity. The rights claiming conducted in relation to migrant workers is largely achieved through negotiations with employers under the threat of 'going to court'.

As regards the costs of litigation, being represented by a trade union opens up the possibility of litigating in the Labour Court. Thus, the unions play an important role from an access to justice perspective. Without membership and representation by a union, the migrant worker must sue the employer in a district court and assume the financial risk involved in this process. The Union Centre for the Undocumented[12] has on occasion obtained state-funded legal aid to cover the costs of the civil litigation process for undocumented migrants. Still, the representatives of the unions and semi-union organisations understand the risks involved for the migrant workers when turning to the union. For migrants who lack permanent residence, mobilising rights may in practice lead to them being deported and losing their livelihood. One union representative pointed out that the migrants risk becoming homeless:

> When we contacted the employer, from the union, the employees were fired, they also lived with the employer, so they were evicted immediately. And that was problematic; here they were really in a vulnerable situation, without income, without housing. (Union)

[12] The Union Centre for the Undocumented (Fackligt center för papperslösa) is an organisation formed in 2008 by unions within the LO, TCO and Saco union confederations. The centre operates as a coordinating organisation for undocumented migrant workers from different industries seeking assistance with a labour dispute, passing the workers' cases on to the local trade union within their occupational sector.

This example illustrates the close links and dependencies between different economic and social rights. Further, one union representative explained how labour rights are also linked to the right to health:

> There is a case of a man who works in a construction company who had a stroke. It turns out that the employer has not paid taxes, so he [the worker] has not been insured or registered here. Got huge hospital bills, not insured, not in Poland, not in Sweden, ends up on the street. He has become paralysed in Sweden. So that's the kind of situation it can lead to in these extremes. (Union)

Although unions can provide access to justice for some by providing knowledge, competence and financial guarantees when litigating in court (see Cappelletti and Garth, 1978; Goodey, 2008), there are huge barriers to exploited migrant workers accessing their social rights in Swedish society. This is especially true as a result of the nature of the migration regime and the precariousness of the migration status faced by many temporary foreign workers, which produce a well-founded fear that the loss of employment could result in the loss of work permits, in deportation and in being unable to support themselves and their families (Lewis et al., 2014; Ollus, 2016; Doyle et al., 2019).

Concluding Remarks

This chapter has explored how in instances of labour exploitation and human trafficking in Sweden, access to justice and social rights are closely linked to the migration regime, the process of victim identification and the gendered nature of assistance programmes. Regardless of the form of exploitation and the level of harms endured, victims require some form of assistance, but often experience difficulties gaining access to social rights and justice. Following an interactional approach, this study has confirmed the interactional nature of being ascribed victim status (Holstein and Miller, 1990), with access to social rights and justice being informed by the perceptions about victimhood in exploitative work that exist among the various social actors involved in the identification process. The interactional dynamics surrounding victimhood render the victims of labour exploitation (especially non-EU third-country nationals) secondary addressees of Swedish anti-trafficking efforts. This is evidenced in the lack of available services for these victim groups and the fact that help-seeking is an unlikely behaviour among these groups. This study has shown that NGOs and unions, as well as state agents to some extent, serve as facilitators in the process of seeking access to justice and social rights. While

state agents (such as the police and prosecutors) are the 'gatekeepers' in relation to the provision of support (Segrave and Powell, 2015)—both as a result of their role in the identification process and their ability to grant the right to a temporary residence permit, union representatives serve as the gatekeepers in relation to the pursuit of justice, especially for non-EU migrant workers who are being exploited in the labour sector. NGOs have been found to play a crucial role in the mobilisation of social rights, offering confidentiality and more options in the help-seeking process, as opposed to the difficult-to-navigate government agencies, with whom cooperation is often perceived to be an obligation and is accompanied by fears of deportation. Victims' limited access to social rights may be seen as an effect of the logic of the migration regime and the principles of inclusion and exclusion associated with the welfare state. Finally, gender has been identified as a significant factor in accessing social rights, since most post-trafficking assistance programmes (including, but not limited to accommodation and emotional recovery) are tailored primarily to the needs of female victims of sexual exploitation. While female victims of sex trafficking have access to a variety of avenues to recovery, assistance to victims of labour exploitation (and particularly those who are men) is typically limited to the provision of temporary housing and legal support.

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9

Welfare Clients' Relational Legal Consciousness: An Empirical Perspective from the Netherlands

Marc Hertogh

Introduction[1]

In 2020, a parliamentary enquiry revealed that the Dutch tax authority had made numerous false allegations of fraud while attempting to regulate the distribution of childcare benefits (Henley, 2021). Between 2013 and 2019, authorities wrongly accused an estimated 26,000 parents of making fraudulent benefit claims, requiring them to pay back the allowances they had received in their entirety. For many of them, this sum amounted to tens of thousands of euros, in some cases leading to unemployment, bankruptcies and divorces. The tax authority admitted that at least 11,000 parents were singled out for special scrutiny because of their ethnic origin or dual nationality. In its final report, entitled 'Unprecedented injustice', the parliamentary enquiry described the working procedure of the tax authority as 'discriminatory' and filled with 'institutional bias' and concluded that 'fundamental principles of the rule of law' had been violated (Parlementaire ondervragingscommissie kinderopvangtoeslag, 2020).

[1] This chapter is part of a wider research project. Parts of this chapter build on and draw from Hertogh (2023).

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_9

The childcare benefits scandal is not an isolated incident, but it illustrates an important shift in the character of the Dutch welfare state. The Netherlands is often considered one of the prime examples of a generous welfare state. In recent years, however, the Dutch government has introduced a series of strict obligations and harsh sanctions for welfare recipients. These changes have turned the Netherlands into a 'punitive welfare state' (Larkin, 2007). This chapter looks at what these developments mean for the legal consciousness—the commonsense understandings of the law (Merry, 1990)—of Dutch welfare clients. In previous studies, people's legal consciousness was often studied from an individualistic perspective. However, Sarat has observed that in welfare offices, the legal rules themselves often remain in the shadows and clients have to rely heavily on the way that officials present and interpret the law. Or, as he puts it, 'The rules speak, but what [clients hear] is the embodied voice of law's bureaucratic guardians' (Sarat, 1990: 345). This suggests that we should not only focus on how welfare clients perceive the law, but also how they perceive the way in which welfare officials understand and apply the law. I will analyse this through the conceptual lens of 'relational legal consciousness' (Young, 2014; Chua and Engel, 2019; Abrego, 2019; Wang, 2019; Young and Chimowitz, 2022; de Sa e Silva, 2022). Rather than analysing legal consciousness individualistically, more studies have started to conceptualise legal consciousness as 'a fully collaborative phenomenon' (Chua and Engel, 2019: 347). Central to this approach is the idea that '[a] person's beliefs about, and attitude toward, a particular law or set of laws is influenced not only by his *own* experience, but by his understanding of *others'* experiences with, and beliefs about, the law' (Young, 2014: 500; emph. added). Headworth (2020) has applied this relational approach in a recent study on welfare fraud enforcement in the US. Based on interviews with welfare fraud workers, he provides a compelling account of their vision of clients' legal consciousness. In this chapter, I will focus on the other side of this relationship: how is Dutch welfare clients' legal consciousness shaped by their assessment of welfare officials' legal consciousness, and to what effect?

In the next section, I will briefly discuss the punitive character of the Dutch welfare state. Then, I will introduce the analytical framework of relational legal consciousness. Next, I will explain the methodology of this study. While many legal consciousness studies are based on semi-structured interviews, I've used an online survey among more than a thousand Dutch welfare clients. I will use the survey findings to analyse both welfare clients' own legal consciousness and their perceptions of how welfare officials understand the law. In the discussion, I will argue that welfare clients' (critical) legal consciousness is not only shaped by their views on Dutch welfare law, but

also by their views on the (harsh and cold) way that welfare officials understand and apply the law. I will conclude with a brief summary and I will discuss some of the implications of these findings.

Punitive Welfare State

Similar to developments in, for example, the Scandinavian countries (Van Aerschot, 2011) and the United Kingdom (Larkin, 2007; Adler, 2018), the Netherlands has seen the 'rise of the repressive welfare state' (Vonk, 2014: 189). For many decades, the Netherlands has been a modern and generous welfare state. In more recent years, however, there has been a 'trend of introducing increasingly strict obligations and sanctions for social security claimants' (Vonk, 2014: 201). According to some scholars, the growing attention given to benefit abuse and fraud is not an isolated phenomenon, but part of a much wider development. Building on Wacquant's (2009) book *Punishing the Poor*, Vonk (2014: 189) describes a growing number of policies in which 'the citizen is made fully responsible for his own life and the degree to which he or she can participate in society' and '[w]here these policies fail, the state reacts with sanctions'. In his view, this has also resulted in a repressive trend in social security and policy.

The Netherlands has an extensive social security system. This chapter will focus on two of the most common types of social security: unemployment benefits (regulated by the *Unemployment Insurance Act*) and social welfare (*bijstand*) for those people who have no means or insufficient income to provide in their livelihood and who do not qualify for other social benefits (regulated by the *Participation Act*). Recipients of unemployment benefits and social welfare have to comply with a number of strict obligations. Firstly, recipients have to provide all the information that might be relevant for the assessment of the right to the benefit. For example, if there is a change in earnings or in the household situation, this should be immediately reported. Withholding relevant information can be sanctioned with heavy fines. Secondly, recipients also have to fully cooperate with the welfare office. Among other things, this means that recipients have to apply for a job as much as possible and they always have to accept a job offer. If one fails to cooperate, this can be sanctioned by withholding benefit rights. In 2012, these obligations and their sanctions were further tightened when the Dutch government introduced the *Welfare Fraud Act*. The Act increased the maximum fine for welfare fraud from 2,000 Euro to a fine corresponding to

the maximum amount of money that the fraudulent recipient was receiving as benefit.

The rise of the Dutch punitive welfare state is also reflected in the way that welfare officials enforce the Welfare Fraud Act and other relevant welfare regulations. In theory, welfare officials can choose between two different approaches in response to rule violations: a 'persuasive' (accommodative, compliance-based) approach and a 'punitive' (sanctioning or deterrent) approach (De Winter and Hertogh, 2020). In the past, Dutch welfare offices mostly used a persuasive approach. Nowadays, however, most welfare offices focus on fighting welfare fraud and prefer a punitive enforcement style (Vonk, 2014; Hertogh et al., 2018). To study what these developments mean for the commonsense understandings of the law of Dutch welfare clients, the chapter will use the conceptual framework of 'relational legal consciousness'.

Conceptual Framework: Relational Legal Consciousness

This chapter will define legal consciousness as 'the ways in which people experience, understand, and act in relation to law' (Chua and Engel, 2019: 336). In short, legal consciousness describes people's 'orientation to the law' (Nielsen, 2000: 1087). A growing number of studies emphasise the relational nature of legal consciousness. Abrego (2019: 663) found, for example, that young adults who grow up in Latino mixed-status families 'come to understand their juridical category relationally through their conversations with and close observations of loved ones'. Consequently, 'family and loved ones' experiences were central to study participants' development of legal consciousness' (Abrego, 2019: 664). From this perspective, it's important not only to focus on people's *own* (first-order) legal consciousness, but also at a 'second-order' layer of legal consciousness: 'people's perceptions about how *others* understand the law' (Young, 2014: 499; emphasis added).

Methodology

Most legal consciousness studies are based on interviews and observations. However, in previous qualitative studies, several important questions were still left unanswered. For example, '[w]hen does a person's perceptions of others' beliefs influence that person's relationship to the law?' and '[a]re certain aspects of legal consciousness more relationally influenced than others?'

(Young, 2014: 526). To address some of these limitations, this chapter is based on an online survey among welfare clients to study their legal consciousness.

A total of $N = 1{,}305$ Dutch welfare clients completed the survey. These survey participants consisted of two groups: unemployment benefit recipients ($N = 709$) and social welfare recipients ($N = 596$). Participants were recruited from a representative panel (TNS-Nipobase), which was created and managed by an online survey company from the Netherlands. The data was collected in March 2016. For this study, a representative sample of welfare clients was drawn based on age, gender, level of education and residency. In our sample, respondents were between 19 and 83 years old ($M = 49.40$; $SD = 11.26$), 61% were female and 32% had a low education (elementary school and vocational training). Since all respondents received similar welfare benefits, there was little variation in income.

Variables and Measures

The survey was originally designed to study welfare clients' perceptions of welfare fraud enforcement (Hertogh et al., 2018; Hertogh and Bantema, 2018). However, after analysing the data, it became clear that many of the survey items are also indicative of welfare clients' general orientations to the law. Therefore, in this study, several elements from the original survey were re-used to analyse welfare clients' (collective) legal consciousness. A complete list of items for every scale is displayed in the Appendix. The survey focuses on two groups of variables: (i) clients' own legal consciousness (how do welfare clients experience, understand and act in relation to law?); and (ii) clients' assessment of officials' legal consciousness (how do welfare clients perceive welfare officials' orientation to the law)? In addition, the survey also includes a limited number of open field questions, to allow the respondents to provide answers in their own words.

To translate both dimensions of welfare clients' legal consciousness into concrete survey items, we've used Chua and Engel's (2019: 337) helpful distinction of three 'constitutive elements' of legal consciousness: 'worldview', 'perception' and 'decision'. Worldview refers to 'individuals' understanding of their society, their place in it, their position relative to others and, accordingly, the manner in which they should perform social interactions' (Chua and Engel, 2019: 336). Perception refers to individuals' interpretation of specific events. 'For individuals who perceive an event as unexceptional, law may seem immaterial; for those who perceive the same event as violative of interests or rights, law may seem significant' (Chua and Engel, 2019: 337). Decision

refers to individuals' responses to events. 'Decision may at times involve deliberate choices to use the law but at other times to leave it dormant' (Chua and Engel, 2019: 337).

How Do Welfare Clients Experience, Understand and Act in Relation to Law?

Chua and Engel's (2019) distinction was first used to operationalise welfare clients' own orientation to the law. To assess welfare clients' 'worldview', we used the scale of respondents' perceived obligation to obey the law. To assess welfare clients' 'perception' of Dutch welfare law, the survey used two scales to measure their level of support for two important legal obligations in the Dutch social security system: their support for the obligation to report extra income and their support for the obligation to apply for a job. To analyse welfare clients' 'decision', the survey measured four types of (self-reported) compliance.

How Do Welfare Clients Perceive Welfare Officials' Orientation to the Law?

We've also used Chua and Engel's (2019) distinction to operationalise welfare clients' vision of welfare official's legal consciousness. Young (2014: 502) describes second-order legal consciousness as 'a person's beliefs about the legal consciousness of any individual besides herself, *or* of any *group* whether or not she is part of it' (emphasis added). Likewise, the items in this section do not describe welfare clients' assessment of individual welfare officials' beliefs about the law, but rather welfare officials' collective orientation to the law. However, for many people, welfare officials' orientation to the law is probably quite vague and abstract. This makes it more difficult to translate into direct survey items than their own legal consciousness. Therefore, this study also uses several 'proxy measures' to analyse welfare clients' assessment of officials' orientation to the law. Rather than asking welfare clients directly how they perceive welfare officials' orientation to the law, these items ask clients about their observations of welfare officials and their actions. Indirectly, these items also show how clients assess the ways in which welfare officials experience, understand and act in relation to law. To assess welfare clients' perceptions of welfare officials' 'worldview', we used one direct scale: 'the perceived legitimacy of the welfare office' and one proxy scale: 'the perceived procedural justice of the welfare office'. To analyse welfare clients' understanding of

welfare officials' 'perception', the survey used two (proxy) scales to assess the enforcement style of welfare offices: the perceived level of punitive enforcement and the perceived level of persuasive enforcement. To assess welfare clients' perceptions of welfare officials' 'decision', we used the (proxy) scale of the perceived probability of sanction.

Findings

Based on the survey results, we can analyse important elements of welfare clients' own legal consciousness and their assessment of welfare officials' legal consciousness.

Welfare Clients' Legal Consciousness

The first set of survey data looks at welfare clients own legal consciousness. In relation to welfare clients' 'worldview', most of them self-report that they are generally law-abiding. Nearly two-thirds (63.8%) feel that people should obey the law even if it goes against what they think is right. Also, most respondents (66.7%) say that they always try to obey the law, even if they do not agree with it. Half (48.5%) of them think that disobeying the law is almost never justified.

Reflecting their 'perception', welfare clients are more critical when it comes to specific provisions of Dutch welfare law. Most of them (68.4%) claim they have no problem with the fact that the welfare office can request their income. However, only one in two (52.1%) agrees with the fact that you have to declare all your income and a similar group says that, in their view, failure to report extra income should always be considered benefit fraud (46.9%). There is even less support for the other obligation. Just one in four (26.8%) agrees that if people do not do their best to find a job, they should be cut back on their benefits and even a smaller group (19.8%) thinks that over time, you should accept all jobs. Moreover, one-third (29.6%) of our respondents thinks it's ridiculous that they are being told how often they should apply for a job.

Finally, with regard to welfare clients' 'decision', most of our respondents say: 'I do my best to comply with the welfare benefits rules' (88.1%). Furthermore, a large group (70%) says that they pass on as much information as possible to the welfare office. However, they seem less willing to comply with some of the other benefit obligations. While most of them (80%) claim that they always report (extra) income to the welfare office, only 57% say that

when they occasionally get paid in cash, they will report this to the welfare office. Likewise, although two-thirds (61.9%) of our respondents say that they do their best to find a job as soon as possible, one-third (29%) also says that they do not apply for a job more than necessary. Less than half of our respondents (43.5%) claims that they will do their best to cooperate with the welfare office. Likewise, 45.2% says that, from now on, they will do what the welfare office asks of them.

Combining all three elements of welfare clients' legal consciousness, the survey data support Sarat's (1990: 375) earlier finding that 'legal consciousness is, like law itself, polyvocal, contingent and variable'. On the one hand, and with regard to the law in general, most welfare clients seem to 'express loyalty and acceptance of legal constructions' (Ewick and Silbey, 1998: 47). On the other hand, there are also indications that, with regard to several specific provisions of Dutch welfare law, welfare clients are more critical about the law and less willing to comply with the legal rules. Their critical legal consciousness is reflected in the fact that Dutch welfare clients sometimes 'act strategically in relation to legal structures and authority in pursuit of desired outcomes' (Headworth, 2020: 329) and frequently question the legitimacy of welfare law (see Edin and Jencks, 1993; Gilliom, 2001).

Welfare Clients' Assessment of Welfare Officials' Legal Consciousness

The second set of survey data gives us a good indication of welfare clients' assessment of welfare officials' collective legal consciousness. In relation to welfare officials' 'worldview', most welfare clients think that welfare officials are not interested in their personal circumstances when they apply the law. Although half of them (51.8%) say that the welfare office fulfils its commitments to benefit recipients, only a small group (17.8%) thinks that the welfare office always acts in the interest of benefit recipients. Some people (19.3%) even feel that the welfare office abuses the vulnerable position of clients. Clients are also critical about the level of procedural justice. Half of our respondents (49.4%) say the welfare office honours its commitments. Yet, only one in three (31.4%) says that the welfare office treats clients fairly and a similar group (31.4%) says the welfare office treats people with respect. Also, just one-third of our respondents (33.7%) says that the welfare office explains their decisions and that it allows welfare clients to tell their side of the story (32.1%).

With regard to welfare officials' 'perception', most welfare clients believe that officials use a rather strict interpretation of the welfare benefits rules and

prefer a punitive enforcement style. More than half of them (53.9%) say that the welfare office is like a policeman, who will punish them if they do not comply with the rules. Many clients also say that the welfare office threatens them with punishment if they do not regularly apply for a job (61.9%) and puts them under pressure to look for work (38.1%). Yet, some clients perceive a more persuasive enforcement style. They see the welfare office as their teacher (39%) or their coach (24.9%). In their view, the welfare office explains what is expected from them (60%), encourages them to find a job (39.2%) and gives useful tips (28.1%).

Finally, in terms of welfare officials' 'decision', welfare clients think that breaking the rules will not go unnoticed. Most of our respondents (70.8%) think that there is a good chance that their welfare office checks if they comply with the rules. Likewise, most clients think that their welfare office will find out if they do not report their income (74.1%) or if they do not look for a job (68.7%). Finally, nearly all our respondents (81.2%) think that when the welfare office finds out that someone does not comply with the rules, the chance of a fine is high.

Combining all three elements gives us a good idea of how welfare clients perceive welfare officials' collective legal consciousness. For most clients, a central feature of welfare officials' legal consciousness is their harsh and cold interpretation of welfare law. In their view, this is reflected in the strict application of the rules, the lack of interest in clients' personal circumstances and the emphasis on strict obligations and sanctions. Clients feel that the way in which welfare officials understand and apply the law is characterised by a high degree of 'legalism' (Kagan, 1978). In their view, welfare officials' collective attitude towards the law can be best described as: 'the mechanical application of rules without regard to their purpose, without regard for the fairness or substantive desirability of the results produced by applying the rules' (Kagan, 1978: 92).

Discussion

While in previous studies, people's legal consciousness was often studied from an individualistic perspective, this study points to the relational nature of legal consciousness.

The survey findings suggest that welfare clients' critical legal consciousness is shaped by their views on the harsh and cold way that welfare officials understand and apply the law. To understand how both elements are interconnected, Headworth's (2020) study can serve as an inspiration.

After observing welfare fraud officials and welfare clients in the US, he found that their legal consciousness is shaped in 'an ongoing back-and-forth between each side's assessment of the other' (Headworth, 2020: 347). This resulted in an 'iterative process of social exchange through which different actors' attempts to "read one another's minds" help produce lived legal realities' (Headworth, 2020: 324). A similar 'iterative process' of relational legal consciousness seems to be at play in the current study.

Most Dutch welfare clients feel that people should obey the law even if it goes against what they think is right. They also expect that this position towards the law will be reflected in their interactions with welfare officials. However, rather than the positive attitude they were expecting, clients feel that welfare officials often treat them with a great deal of suspicion. They see all clients as potential fraudsters and therefore mostly emphasise which sanctions will follow if clients break the rules. Many clients feel disappointed, frustrated and offended by this approach. As two of them explain (in the open fields of the survey):

> I expected that [the welfare office] would be much more helpful and that they would act less like a grumpy policeman.

> They made me feel like a parasite, while I would love to work again.

Despite their general willingness to comply with the law, welfare clients feel that welfare officials do not treat them fairly and they experience little procedural justice. As a result, clients start to question the legitimacy of welfare law and they become less willing to comply with benefit obligations (like reporting extra income of applying for a job). When confronted with less compliance, welfare officials will probably respond with further sanctions. For welfare clients, this could be a reason to question the legitimacy of welfare law even more, and so on. Treating welfare clients, who generally comply with the law, as latent criminals can also have a negative effect on their future compliance behaviour. When this happens, the punitive enforcement style of Dutch welfare offices will ultimately result in less rather than more compliance.

Conclusion

As illustrated by the childcare benefits scandal, the Netherlands has increasingly become a punitive welfare state. The aim of this chapter was to analyse how this development affects Dutch welfare clients' commonsense understandings of the law. Based on a survey among more than a thousand welfare

clients, this study points to the relational character of legal consciousness. Welfare clients' critical legal consciousness is not only shaped by their views on Dutch welfare law, but also by their views on the harsh and cold way that welfare officials understand and apply the law. Depending on whether you see the glass as half empty or half full, these findings can have both negative and positive implications. First and foremost, the rise of the punitive welfare state has clearly damaged many welfare clients and their families, who were repeatedly confronted with harsh sanctions and a cold welfare bureaucracy. According to some policymakers, treating each client as a potential criminal (and then asking the client to prove them wrong) is the best way to discover welfare fraud. Moreover, if they find no proof of any wrongdoing, their client is free to go without any further consequences. However, because of the relational nature of clients' legal consciousness, this approach may be more harmful than is often assumed. This study suggests that treating welfare clients, who generally comply with the law, as latent fraudsters may ultimately undermine the perceived legitimacy of welfare law and decrease the level of regulatory compliance. However, there may also be a more optimistic aspect of the relational character of welfare clients' legal consciousness. After all, if the way that clients understand the law is shaped by the views and actions of welfare officials, then these same officials may also hold the key to change clients' legal consciousness. In response to the childcare benefits scandal, the Dutch government has initiated a series of reforms aimed at developing a more personal and accommodative enforcement style for welfare officials. If these programmes prove to be successful, this could be the first step to help restore the legitimacy of the Dutch welfare state.

Appendix

This appendix provides an overview of the scales used in the study. For all scales, the answers range from 'completely disagree' (1) to 'completely agree' (5).

Perceived obligation to obey the law[2]

(M = 3.53; SD = 0.53; Cronbach's $\alpha = 0.80$)

- People should obey the law even if it goes against what they think is right.
- Disobeying the law is almost never justified.

[2] See Tyler, (1990); Hertogh et al. (2012).

– I always try to obey the law, even if I do not agree with it.

Support for the obligation to report extra income
(M = 2.75; SD = 0.85; Cronbach's α = 0.66)

– In my view, not reporting income from chores is benefit fraud.
– I do not think that you have to declare all income to the welfare office. (R)[3]
– I have no problem with the fact that the welfare office can request my income.

Support for the obligation to apply for a job
(M = 3.54; SD = 0.75; Cronbach's α = 0.61)

– I find it ridiculous that it is determined for me how much I should apply for a job. (R)
– I think it is right that over time you should accept all jobs.
– People who do not do their best to find a job should be cut back on their benefits.

Overall compliance
(M = 4.11; SD = 0.62; Cronbach's α = 0.78)

– I pass on as much information as possible to the welfare office.
– I do my best to comply with the welfare benefits rules.
– I honour the agreements with my welfare office as much as possible.

Compliance with the obligation to report extra income
(M = 3.68; SD = 0.76; Cronbach's α = 0.61)

– If I do paid chores for friends, I report this to the welfare office.
– If I occasionally get paid in cash for work, I do not report this to welfare office. (R)
– I always report all income to the welfare office.

[3] Reversed item.

Compliance with the obligation to apply for a job

(M = 3.27; SD = 0.76; Cronbach's α = 0.53)

- I do my best to find a job as soon as possible.
- I do not apply for a job more than necessary. (R)
- I accept all the work that is offered to me.

Intended future compliance[4]

(M = 3.54; SD = 0.67; Cronbach's α = 0.72)

- From now on, I will do what the welfare office asks of me.
- I don't care about the welfare office anymore. (R)
- From now on, I will do my best to cooperate with the welfare office.

Legitimacy of the welfare office

(M = 3,07; SD = 0.74; Cronbach's α = 0.77)

- How much do you trust the welfare office?
- The welfare office abuses vulnerable people. (R)
- The welfare office acts in the interest of benefit recipients.
- The welfare office fulfils its commitments to benefit recipients.

Procedural justice[5]

(M = 3.10; SD = 0.77; Cronbach's α = 0.85)

- The welfare office treats welfare recipients fairly.
- The welfare office treats people with respect.
- The welfare office honours its commitments.
- The welfare office explains why certain decisions are taken.
- The welfare office gives people little chance to tell their side of the story. (R)

[4] See Hertogh et al. (2012).

[5] See Sunshine and Tyler (2003); Reisig et al. (2012).

Punitive enforcement[6]

(M = 3.51; SD = 0.91; Cronbach's $\alpha = 0.91$)

- The welfare office is like a policeman; they punish me if I do not comply with the rules.
- The welfare office puts me under pressure to look for a job.
- The welfare office threatens with punishment if I do not apply for a job.

Persuasive enforcement[7]

(M = 3,01; SD = 0.86; Cronbach's $\alpha = 0.83$)

- The welfare office is like a coach; they help me to comply with the rules and to find a job.
- The welfare office is like a teacher; they explain the welfare benefits rules.
- The welfare office explains well what is expected of me.
- The welfare office encourages me to look for a job.
- The welfare office gives good tips to get a job quickly.

Probability of sanction

(M = 3.89; SD = 0.62; Cronbach's $\alpha = 0.77$)

- I think there is a good chance that the welfare office checks whether I comply with the rules.
- I think that the welfare office will find out if I do not look for a job.
- I think that the welfare office will find out if I do not declare my income.
- If the welfare office finds out that someone does not comply with the rules, the chance of a fine is high.

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[6] See Mascini and Van Wijk (2009).

[7] See Mascini and Van Wijk (2009).

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10

Youth Homelessness in the Danish Welfare State: How Do Young Persons in Homelessness Mobilise Rights?

Stine Piilgaard Porner Nielsen and Ole Hammerslev

Introduction[1]

Between 2009 and 2019, the number of persons aged 18–29 experiencing homelessness in Denmark almost doubled (Benjaminsen, 2019a), increasing from 1,123 in 2009 to 1,928 in 2019, indicating welfare challenges related to this age group (ibid., 28). In Denmark, persons in homelessness are defined as 'persons who do not have their own place, and who are referred to temporary housing or who live temporarily and without a tenancy agreement with friends and family' (ibid., 15). On top of lack of housing, the young persons often experience highly vulnerable situations due to consistent and complex needs for social support (Benjaminsen and Andrade, 2015; Fitzpatrick, 2000). Danish social law offers legal means to address homelessness. It delegates authority to municipal level and allows for welfare professionals'[2]

[1] This chapter is an output from the research project FRAMLAW which is funded by the Independent Research Fund Denmark.

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[2] In this chapter, we apply a broad definition of welfare professionals, referring to professionals who in different way support processes of mobilising welfare rights.

S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_10

performance of discretion which add to the welfare system's complexity and opaqueness. While addressing homelessness is a municipal responsibility, Danish social law stresses that municipalities may draw on both other state actors' and non-state actors' resources as means for the municipalities to deliver on social services, whereby social law offers a space for collaboration and interdependence between the actors (Nielsen and Hammerslev, 2022b; Sand, 1996). Decentralisation and actor-interdependence construct potential differences in possible paths to pursue in the process of mobilising welfare rights to exit homelessness. Welfare rights include the right to support to exit homelessness, access social security, (re)enter the labour market or educational programmes, and substance abuse treatment. Despite the diverse character of these welfare rights, they have common aims and organisational characters: Their aim is to mitigate citizens' social problems through access to support, and thereby further citizens' social inclusion. Second, the delivery on these welfare rights is organised at municipal level, ascertaining the municipalities' decisive role as entry points for access to welfare rights. National law's delegation of authority to municipal level results in potential municipal variation in the supply of social support. For example, in some municipalities, welfare professionals perform outreach work targeting people sleeping rough, and in some municipalities, non-state actors run youth shelters to increase the supply of temporary shelter places to young persons in homelessness. Though national legislation invites for municipal variation, a certain institutional standardisation of paths to mobilise welfare rights is identified: First, since Danish municipalities are the main responsible actors for offering social support, they are key entry points for citizens' access to this support. Second, the institutional organisation of welfare support entails citizens' engagement with a myriad of actors and units in the process of mobilising welfare rights, depending on the complexity of the situation. In this chapter, we examine pathways to welfare rights mobilisation among young persons in homelessness as we ask:

> Which pathways do young persons experiencing homelessness pursue when mobilising their welfare rights, and what motivates their choice?

Existing research stresses that especially socially marginalised citizens, meaning citizens who are experiencing social problems such as substance abuse, homelessness and long-term unemployment all of which challenge their social inclusion, may experience problems with accessing welfare rights (Baier, 2010; Hammerslev and Nielsen, 2021; McCann, 2008; Nielsen and Hammerslev, 2022a; Zemans 1982). The next section outlines the theoretical framework of legal mobilisation applied in this chapter to analyse the young

persons' processes of mobilising law to address their social situation. Subsequently, a section accounts for the choice of our qualitative methods, then followed by the analysis. Lastly, the chapter is rounded off with a concluding discussion.

The Theoretical Framework: Legal Mobilisation

In a dialectic process between our theoretical readings and analyses of our empirical data, we draw on concepts from legal mobilisation literature. The literature defines, in different ways, legal mobilisation as a process where individuals and collective actors transform their perceived problems[3] into legal problems and then mobilise law with the aim of changing their situation (see e.g. Vanhala and Kinghan, 2022; Zemans, 1982). Legal mobilisation literature often applies a bottom-up perspective, examining individuals' ways to mobilise law when encountering a 'perceived problem' (Zemans, 1982), as 'an articulation of a grievance' (McCann, 2008) or a 'perceived injurious experience' (Felstiner et al., 1981). Legal mobilisation literature has a process-centred approach, examining the process from when a problem is perceived and articulated, then transformed into a legal issue which may then be acted upon by the individual (Felstiner et al., 1981; Zemans, 1982).

Several key elements are decisive for the process of mobilising rights. In this chapter, we draw on existing literature that introduces concepts and approaches to the analysis of legal mobilisation processes. Generally, a problem undergoes a transformation process, where, first, a person must perceive an occurrence as a problem. Perception is subjective and critical for the processes of legal mobilisation as it influences whether a person decides to take action, lump the case or pursue a path of avoidance. To take action indicates that law is actively applied to change the situation; lumping is the decision to, initially at least, tolerate or ignore the situation and thus a conscious choice of *not* to act within the social space of law, whereas avoidance is a more proactive choice of action with the intention of 'lessen if not eliminate the felt wrong' (Zemans, 1982, p. 1005). Elements like the type of incident, the relationship between the parties involved and the seriousness of the situation affect the 'perception of a new event as normal, problematic, harmful, or wrong' (Chua and Engel, 2019, p. 337). As Zemans (1982)

[3] In the literature, 'problem' is applied as a concept. In this chapter's analysis, we refer to the young persons' homelessness as a situation rather than a problem as the young persons themselves do not necessarily articulate the situation as a problem. By drawing on 'situation' rather than 'problem', we attempt to overcome the embedded normativity reflected in 'problem' (Lewis, 1973).

points to, community norms, persons' economic, social and educational resources and their rights consciousness[4] also play a role in the transformation process as they influence possible schemes of perceptions as well as perceptions of possible practices. Intermediaries may, too, be decisive for the individual's choice of path to pursue (Olesen and Hammerslev, 2018). As also Bourdieu (1986) stresses, a person's resources and sense of the social world influence the ability to translate a social situation into the language of the law and, from that, transform it into a legal situation, thereby enabling a process of mobilising rights. Moreover, studies on access to justice (Hammerslev and Nielsen, 2021; Lemann Kristiansen, 2022; Nielsen and Hammerslev, 2018, 2022a) stress that (non-)transparency of rules and welfare bureaucracy influence persons' ability to mobilise law. The individual's expectation of success and anticipated costs of welfare claiming, that is, how many resources that may be demanded in the rights claiming process, can further influence whether action, lumping or avoidance take place (Brodkin and Majmundar, 2010; Zemans, 1982). These processes are complex and contingent. If a person decides to take action, this may be done on the person's own or by seeking advice or assistance with the purpose of taking a case to a legal institution, including government agency. In such cases, persons may refer to the law and to actors with legal insights and expertise with the purpose of strategically positioning themselves in encounters with the welfare system to pursue a specific result (Mnookin and Kornhauser, 1979).

Method

The empirical data in this chapter is collected through semi-structured interviews to invite for a discursive space of letting respondents' stories take the lead, yet still enabling comparison across the interviews (Hertogh, 2018; Mik-Meyer, 2018). As we are inspired by the anthropological approach to studies of legal mobilisation (McCann, 2008), we emphasise the respondents' construction of meaning and motivation for behaviour as reflected in their narratives. Thus, it is the young persons' accounts of experiences and practices related to homelessness rather than their actual practices that constitute the empirical data.

Respondents were selected based on the criteria that they experience or recently had experienced homelessness, they were Danish citizens, and that

[4] In her article, Zemans does not define the concept of 'rights consciousness'. Instead, we draw on Fekete et al.'s (2022) definition of rights consciousness: 'whether citizens are capable of formulating rights-based claims in everyday conflict situations' (p. 224).

they were 18 to 29 years old. We delimited our focus to this age group based on two aspects: First, statistics indicate a rather dramatic increase in homelessness in the age group of 18 and 29 compared to the relative increase in the general homeless population in Denmark. Second, Danish social law regulating access to social security outlines specific rules related to this age group. These rules include a lower level of social security compared to persons from the age of 30 and an increased activation focus with the purpose of including the young persons in either the labour market or in educational programmes (Nielsen and Hammerslev, 2022b). Following the legal regulation, this group of persons generally has less money available which makes it increasingly difficult to find affordable housing (Benjaminsen, 2019b, 6, 13).

We delimited our focus to respondents residing in *one* of two of the 98 Danish municipalities. The two municipalities were selected based on statistics that show a percentage-wise comparable number of young persons in homelessness. However, in this chapter we do not elaborate further on municipal variations and similarities, rather we focus on the young persons' descriptions of mobilising welfare rights. We conducted 11 semi-structured interviews with young persons. In itself, 11 interviews is not a large number, but taking into consideration our selection criteria and the saturation of the data material, we argue that the quality of the interviews does provide an empirical basis for our examination (Guest et al., 2006).

In the analysis, we elaborate on five of the 11 respondents' narratives as thick descriptions (Geertz, 1973). The five descriptions are included to illustrate the influence of rights consciousness, social network and sense of the welfare bureaucracy for their agency. Contact with the young persons was established through different gatekeepers. Generally, gatekeepers are central in cases where the target group may be difficult to reach (Cohen and Arieli, 2011; Watters and Biernacki, 1989), as, for example, people in homelessness who often live instable lives. For us, the gatekeepers were decisive as they helped us identify potential respondents, and they drew on their trust-based relations with the young persons as they vouched for us, thereby contributing to overcome potential barriers of distrust. Gatekeepers were, for example, welfare professionals from job centres, contact persons and staff at a warming centre where the manager allowed us full access. During our field work at the warming centre, we established contact with young persons who were willing to share their story of homelessness. Another example is the gatekeeping function of an NGO that helped facilitating contact to their target group of socially marginalised citizens, including persons in homelessness. Several of the interviews took place ad hoc, for example at the warming centre, and were

often interrupted by respondents' lack of concentration and/or the buzzing life of the surroundings.

Five of the 11 interviews were recorded and verbatim transcribed. Six interviews are reconstructed based on field notes as respondents, despite consenting to the interview, asked for the interview not to be recorded. From this it follows that for six of the interviews, the data material consists of notes from the conversation which were jotted down as soon as possible after the interview. This implies that there may be information which is unintentionally yielded or imprecise as a result of a lack of details in the researchers' recollection of the conversations (Spradley, 1979). We sought to systematise data, whether recorded or not, by leaning on an interview guide with the purpose of ensuring rigour in the data despite the different characteristics of data. All data is pseudonymised by assigning the young persons other names and noising their identity by slightly adjusting age which does not affect the data material's contribution in its entirety as these changes do not conflict with the stories shared by the respondents (Kvale, 1994). The data was coded in NVivo, and in the process of writing this paper, we coded data based on two main categories, namely 'institutional paths' and 'individual factors'. These main categories were established based on existing legal mobilisation and pathways to justice literature (Genn, 1999; Hammerslev and Nielsen, 2021; McCann, 2008; Nielsen and Hammerslev, 2018; Pleasence et al., 2003; Zemans, 1982). The main categories were then further specified, drawing on the interview data. Institutional paths were divided into, for example, state versus non-state actors whom the young persons would interact with to mobilise welfare rights. Individual factors were further specified into, for example, 'rights consciousness' and 'personal resources' as the data stressed that these factors were decisive for the young persons' choice of legal mobilisation paths. These categories supported a systematic analysis of the young persons' mobilisation of welfare rights to address their homelessness situation.

Analysis: Choice of Paths—Complex and Contingent Processes

Generally, the young persons' stories reflect experiences of conflict and disillusion in their attempts to mobilise welfare rights. These experiences are often caused by lack of resources to meet welfare bureaucratic requirements, for example related to keeping appointments with numerous welfare professionals and navigating on digital platforms (Nielsen and Hammerslev,

2022a).[5] Though the young persons share experiences of homelessness, they express different experiences and understandings which inform their perceptions and practices in the processes of mobilising welfare rights. In this section, we analytically draw a distinction between *active* and *passive agency*, inspired by the empirical data introduced below. Active agency refers to the respondents' own practice performance to pursue paths to welfare rights. Passive agency refers to either respondents' non-practices or to practices taken by others but the respondents to improve the social situation. Some narratives reflect a great extent of active agency in positioning oneself in encounters with welfare professionals whereas others appear rather passive in this process or actively decide to lump their case. It is pivotal to stress that the agency identified in the narratives is not static. Rather, it potentially fluctuates as processes of legal mobilisation are dynamic, contingent and subjective, and individuals' experiences of such processes and other elements in life inform future practices.

We unfold the relative difference between active and passive agency through the analysis of five respondents' descriptions. Below, we draw on quotes from interviews with the young persons to illustrate the complex and contingent character of legal mobilisation processes. The five respondents are Philip who is in his early 30s and experienced homelessness in his 20s, Simon and Michael who are both in their mid-20s, and Jacob and Anne who are in their early 20s. At the time of the interview, Philip and Michael had recently exited homelessness whereas Simon was still homeless. Jacob was admitted to a youth shelter which offers temporary residence. Anne, on the contrary, did not categorise her situation as one of homelessness. Rather, she argued that she was not in a situation of homelessness as she could stay with friends or family on day-to-day basis. However, we include Anne's story as her situation can be defined as one of homelessness in accordance with the official Danish definition.

The analysis is structured as follows: We start with Philip's account which we interpret as reflecting active agency, and we end with Anne's story which we interpret as reflecting more of a passive agency, placing the stories of Michael, Simon and Jacob between the two. In the following, we elaborate on the analyses to illustrate the contingency characterising legal mobilisation processes. Despite the respondents' different narratives, we identify overlapping aspects, namely the relevance of the respondents' social network, their

[5] Communication between public authorities and citizens is generally facilitated via digitalised platforms, such as *e-Boks* and *borger.dk*, and citizens access these platforms through the use of digital IDs.

rights consciousness and their sense of position as rights holder in a welfare state context.

Philip's Story

'It's my mantra: "It's difficult to break the rules if you don't know them"', Philip states. Taking a starting point in this perspective on law, knowledge of law is, to him, a means of power to strategise one's practices. Drawing on Philip's story, decisive factors for his path to mobilise welfare rights are individual resources as rights consciousness and social resources as friends and relations to the Danish NGO, SAND [The Danish Homeless Organisation], which is specialised in offering support to persons in homelessness. Before turning 18, he was placed in a welfare institution, but the placement terminated when he turned 18 as he, in accordance with Danish welfare law, was then to be considered an adult and thus not eligible for placement at the institution. For some time, he travelled around the country, 'couch surfing or illegally subletting at friends' places'. However, this came to an end as a landlord found out that he was illegally subletting and evicted him and two of his then roommates. This situation made him apply for admission at a municipal youth shelter to which he was then admitted together with one of the former roommates, yet 'here I was just put on hold'. Based on previous experiences with welfare institutions, he was aware of options for temporary stays at youth shelters which motivated him to reach out to these state actors. However, though he was granted support as he was admitted to the shelter, Philip's expectations of success with improving his situation appears to be failed due to the lack of progress experienced during his stay at the shelter. Later during his stay, his former roommate was allocated an apartment under the auspices of the youth shelter, and Philip moved in with him while waiting for an apartment of his own. He explained to us that:

> When you are admitted to a shelter it is a legal requirement that you are signed up for social housing. I did that, but it was difficult because the woman I talked to about that did not seem to know that you have the right to take exception to their suggestions of housing, for example based on the level of rent or the locality of the apartment.

Philip's rights consciousness reflects an awareness of how to access social support in the welfare system; yet in the actual encounter with the welfare bureaucracy, he experiences a mismatch between his knowledge of rights and the welfare professional's practices. Based on his rights consciousness, he takes

exceptions to some of the housing suggestions: 'I didn't feel secure about the neighbourhood they suggested. Too many drugs, I wouldn't last long there, then I would be back on the streets again'. Motivated by his desire for stabilising his housing situation, he thus attempts to mobilise his rights. Later, after being allocated suitable housing based on these exceptions, Philip applied for aftercare[6] which

> was basically "let's rent a movie and eat pizza". Nothing about how to clean your apartment or draw up a budget. I never learned these things … and they wouldn't offer more: "That's not our department, we don't have any of your papers because your case was under the Children and Young Persons Unit so we can't offer you support".

Again, based on his perception of his situation and need for support to stabilise it, Philip reaches out to whom he identifies as relevant actors, but the organisation of the welfare bureaucracy into separate and somewhat isolated units appears to be a hindrance. Philip's pursuing of welfare rights is informed by his sense of the welfare system, as he reflects on his ability to engage with the welfare bureaucracy: 'it's only because I am as resourceful as I am, due to my experiences'. Though his experiences and individual resources do further his ability to independently pursue a path to welfare rights, he does at times fall short in the actual encounters with welfare bureaucracy. In these cases, he draws on the expertise of SAND which as an intermediary 'has helped me to cope with it all, and sometimes I ask them to represent me: "You have the absolute authority to speak on my behalf". And then they do that'.

Analysing Philip's story, we interpret it as one of a greater level of active agency, informed by rights consciousness and a resourceful social network: He knows how to speak the language of law, and when he himself fails to mobilise his rights, he draws on social relations with expertise, such as non-state actors who, on his behalf, apply law in the representation of his interests.

Michael's Story

Michael's story reflects lesser active agency compared to that of Philip's, and it reflects the potentially decisive role that welfare professionals play in supporting citizens' mobilisation of welfare rights. 'My contact person at my

[6] Aftercare is an offer of support for young persons aged 18 to 22 who immediately up to their 18th year have had a permanent contact person or have been placed outside the home. The purpose of aftercare is to contribute to the young persons being supported to establish an independent life on an equal footing with other young persons (Socialstyrelsen, 2021).

school reached out to the youth shelter', Michael explains as he accounts for the initiating process of addressing his homelessness situation: 'I knew that there were some criteria you need to meet but I wasn't sure if I would match them'. Drawing on his sense of the welfare state, he considers it a potential entry point for support, yet his perception and categorisation of his own situation hinder further mobilisation of welfare rights. In this case, the contact person, as an intermediary, transforms Michael's situation into that of a social situation which can be addressed legally in the welfare system. Action was then taken to admit Michael to a youth shelter where he was allocated a contact person: 'It was a rough place with drugs, alcohol, violence. But it was only temporarily, and that made it bearable'. Once every month the so-called Urgent Housing Office of the municipality would drop by the shelter and inform about housing possibilities and facilitate matches between the young persons and available housing, Michael told us. Based on these introductions, there was a housing match between the municipal supply and Michael's needs, and he then got an apartment in which he at the time of the interview still lives. In the process of exiting the shelter and settling in at the apartment, his shelter contact person introduced him to a new contact person who would support him in this process and be available for advice and guidance. This reflects a so-called chain responsibility across municipal units where focus is on stabilising relations between young persons and contact persons: 'My contact person at the shelter reached out to the new contact person. They know each other. And then the three of us met up, and now the new one is my contact person'. In Michael's situation, the contact persons seem to constitute a base of trust and self-confidence, especially in encounters with other welfare authorities, such as job centre caseworkers:

> When you are dealing with the municipality, it's about sanctions, this immediate danger, and threats. Of course it's also about support but it's mostly about threats. Whereas, with the contact persons, they are there to help.

His distinction between 'the municipality' and 'the contact persons' is, institutionally, interesting as the contact persons are, too, municipal actors. Yet, from Michael's perspective, they perform a different role, and based on this role performance he categorises them as central for his ability to navigate in the welfare bureaucracy: 'Sometimes my contact person accompanies me to the meetings at the job centre. Not that she has to say much, just to have someone there who knows you. It helps'. Bringing the contact person to these encounters can be interpreted as Michael's strategy to position himself in the somewhat standardised welfare encounters where the trust-based relations to the contact person furthers his sense of agency in dealing with other welfare

professionals with whom he does not have these trust-based relations. Now, Michael's social situation appears to be stabilised. He is allocated affordable housing and enrolled in an educational programme. His contact person is still present in his life, stressing the relevance of these social relations. As he explains: 'I do not know much about the rules and my rights. But I know that I know someone who does'. In Michael's case, his agency is less active compared to Philip's as it is initiated and facilitated primarily by others but himself. This also stresses the contingent character of legal mobilisation as social network and other contacts can be random, determined by time, space and relations.

Simon's Story

As with Michael, we interpret Simon's story as one of less active agency. At first, Simon's narrative reflects a high level of autonomy, but then, due to failed success in his pursuing of welfare rights, he resigns and lumps his legal mobilisation process. Simon's background is unique, compared to the other respondents: He has an education, and he used to own a company. His de-route began as his use of substances got out of hand: Unable to deliver on client contracts, his company went bankrupt, and he was evicted from his apartment as he could not pay rent:

> First I thought I could deal with it [addressing substance abuse and homelessness] myself. Save up some money for an apartment deposit. But then, I thought, that if I was to be enrolled in the substance abuse centre, then why not *go all in* and deal with the municipality, too? But I've been homeless now for two years, and they just keep telling me "we can't help you".

Simon's rights consciousness and sense of the welfare system at first sparked practices to reach out to municipal actors as entry points for mobilising social rights. Yet, after having experienced rejections from the municipality, he appears hesitant in mobilising law through these channels. The rejection is, according to Simon, motivated by the municipality's different perceptions of his situation: 'They keep telling me "You are a special case" because of my background. But I am homeless, I have no money, no home, I have to borrow money from everyone I know'. From Simon's perspective, the welfare system's standardised categorisation of who can be considered as living in homelessness sustains his vulnerable situation. He tried several times to reach out to the municipality for financial support and housing assistance:

> They want me to document my income. But I haven't had any regulated income for two years, only black money. And I can't document that. "Then we can't help you", they say.

Again, Simon experiences rejections from the welfare bureaucracy, this time sparked by divergent perceptions between Simon and the welfare bureaucracy related to the relevance and importance of documentation for access to support. As Simon's lived life, namely that of earning black money, clashes with the standardised procedures of the welfare bureaucracy, it results in an ongoing failure to meet welfare systemic expectations which leads him to lump the case. He explains that he, as a result of the company bankruptcy has 'read a lot on rules and regulation, and I am pretty good at that. But this municipal regulation, I don't know much about. It is tricky'. Thus, in some contexts, he is resourceful in acquiring and applying legal knowledge, yet, to him, lack of transparency in welfare regulation is considered a challenge for the ability to mobilise welfare law. Compared to Michael's narratives, there is an absence of intermediaries in Simon's story. He attempts to draw on his own resources, sparked by his initiate categorisation and perception of himself as independent and autonomous, yet as he fails to further his case, he lumps it, whereby he settles into resignation and passivity, and the case goes no further.

Jacob's Story

We interpret Jacob's story as one of reflecting somewhat passive agency. Jacob has recently been admitted to a municipal youth shelter because of instable family relations: 'I lived with my father, but he was sent to prison. Then I phoned around [to shelters], and I ended here [at the municipal youth shelter]', he explains. In this account, Jacob takes active measures to address his housing situation, based on a rights consciousness and sense of the welfare system that shelters may be entry points for support to temporarily stabilise the situation of lack of housing. Though performing practices to address the situation, we categorise Jacob's narrative as one of passivity as his categorisation of himself and his (lack of) resources appear to hinder active participation in the further process of exiting homelessness:

> When you are homeless, you don't have any energy because everything is just a mess. The economy is a mess, bills keep coming but you try to hide from it all and make some fast money instead. Then you're free from those municipal meetings. You are bogged down by those, at least I was. But then again, I don't have much energy.

Jacob's rights consciousness is reflected in his awareness of possibilities for municipal support, but lack of resources to accommodate to the standardised requirements of the welfare bureaucracy resulted in avoidance behaviour. Yet, his stay at the shelter may mark a change: The shelter staff offers to accompany residents to appointments, for example with the job centre, substance abuse counsellors or physicians. Moreover, a representative from the municipal job centre stops by at the shelter once per week to help with drafting of CVs and job applications. In these practices, shelter staff and the job centre representative may perform the role of intermediaries in attempting to facilitate relations between shelter residents and relevant welfare professionals. In doing so, they may mitigate residents' experiences of welfare claiming costs which Jacob, too, expresses: 'I can't apply for jobs because I don't have an email account, and I don't have a CV. I know there is someone dropping by from the job centre, and I want to talk to her about it'. In addition to not having the energy to engage in welfare encounters, Jacob does not have digital resources to meet standardised procedures of digital communication with welfare actors, nor to position himself competitively in job hunt processes. As he explains, 'I don't have a digital ID so I can't check my digital mailbox. I have no overview of what's going on. None, whatsoever'. His failure to meet the standardised expectations of digital competences appears to some extent to settle him into resignation, yet his recently acquired awareness that support can be offered at the shelter spurs reflections on potential practices to improve his situation:

> It would help, I think, to have some from the staff with me to the appointments [with the municipality] … The meetings can be long, and I don't understand half of it. It doesn't matter to me, and then I forget everything. It would be nice to have someone to accompany me, otherwise it's just me and five from the municipality or something like that.

As with Michael's relations to his contact persons, having someone accompany you may construct a sense of improved abilities to perform practices in the welfare bureaucratic encounters. These experiences, as expressed by both Jacob and Michael, stress the relevance of potential intermediaries in the young persons' social network for their processes of mobilising welfare rights.

Anne's Story

As with Jacob's story, we interpret Anne's story as one of reflecting passivity. Though Anne explicitly does not categorise her situation as one of homelessness, we include her story to illustrate the relevance of categorisation and perception for the initiating phase of mobilising rights. As she describes: 'I am not really homeless. I have my address at family members', and then I spent the nights at my partner's place. Or at friends' places'. Thus, she has social resources to stabilise her housing situation on a day-to-day basis, and, from her perspective, there is no basis for action. It can be argued that her social network of friends, family and her partner remedy her lack of housing, but at the same time sustains the situation. Through these connections she finds shelter every night, however it is inherently instable and temporary and not a base for a more stable housing situation. It appears that there is an absence of intermediaries with expert insights who potentially would be able to transform Anne's situation into a welfare legal context whereby a process of legal mobilisation could be initiated. The absence of intermediaries was also the case for Simon who, too, did not receive welfare support to address his housing situation. Yet, the difference between Anne and Simon is that Simon did try to reach out to relevant welfare professionals whereas Anne did not. Instead, she argues that she is not '*really* homeless' (our italicisation). Going into depth with this short self-description, it could be argued that Anne does have a rights consciousness related to her precarious housing situation, however she distances herself from stereotypical ideas of persons in homelessness by drawing a distinction between the 'really homeless' and herself. In addition, she relativises her situation in relation to both the welfare bureaucratic system and citizens who are in more dire housing situations: 'I have a place to stay, though I don't always know where and for how long. So, I don't want to be a bother in the welfare system. Others need it more than I do'. Following this reflection, Anne expresses a rights consciousness related to opportunities for support but decides to avoid interactions with the welfare system as she perceives her situation as less problematic compared to others. In her case, the absence of intermediaries and her self-categorisation based on relativism result in passivity whereby a path to legal mobilisation is not pursued.

To sum up, the young persons' rights consciousness, their social network and their sense of themselves as rights holders in a welfare bureaucratic context are, in different ways, central factors for their paths to mobilise

welfare rights. Despite these overlapping factors, the unfolding of the respondents' stories illustrates the complex and contingent character of legal mobilisation processes. Moreover, the stories stress the often-experienced mismatch between the standardised welfare bureaucracy which rely on fixed criteria and documentation and the often chaotic lived lives of the young persons, making it difficult for the young persons to navigate on standardised welfare systemic terms.

Concluding Discussion

Applying a bottom-up perspective to the analyses of transforming welfare rights into practice, this chapter includes some of society's most marginalised citizens' perspectives to examine their experiences of mobilising law, namely those of young persons in homelessness in the Danish welfare state.

Despite the contingent and complex character of the respondents' mobilisation processes, we identified overlapping elements of significance in their narratives: Rights consciousness, social network and 'sense' of the welfare state influence the respondents' level of agency. Based on this, we draw up an analytical distinction between active agency and passive agency to illustrate the elements' dynamic relevance.

Respondents who reflect a greater rights consciousness, sense of the welfare state and of themselves as holders of rights are interpreted as reflecting 'active agency' which spark practices of pursuing welfare rights. When experiencing high costs of welfare claiming, the respondents are able to draw on intermediaries, including non-state actors, in their social network whereby non-state actors potentially play a decisive role for the young homeless' opportunities in encounters with the welfare bureaucracy.

Respondents whose narratives reflect general rights consciousness and sense of the welfare state, but who do not actively pursue paths to welfare rights are considered as reflecting a more 'passive agency'. The passivity is reflected in the lack of actively claiming rights. The passivity is often caused by either lack of reserves of energy to 'pay' the welfare claiming costs of navigating in the welfare bureaucracy, mismatch in perception and categorisation of the situation, or the absence of intermediaries to facilitate a process of mobilising welfare rights.

In between the two distinctions of active and passive agency, respondents' accounts reflect a certain level of rights consciousness and sense of being holders of rights in a welfare state context. Yet, opaqueness in welfare state regulation and the character of the welfare bureaucracy may hinder

processes of mobilising welfare law. In Michael's case, this process is to a large extent facilitated by contact persons who, as welfare professionals, transform Michael's individual situation into a welfare context. In Simon's case, the absence of intermediaries appears to be a hindrance for his ability to overcome experienced obstacles on the path of pursuing welfare rights. Comparing the five respondents' descriptions, we interpret the two first narratives, Philip's and Michael's, as reflecting active agency, though to different extents. The common factor between the two respondents is the fact that they have recently succeeded in exiting homelessness. This means that time has passed since they experienced the acute and urgent situation of homelessness, and time's passing may have influenced their present perception of their past experiences, allowing for greater resources to reflect upon their processes and experiences.

These analyses of the young persons' narratives offer insights into their experiences and perceptions of encountering a complex welfare state bureaucracy which they to a large extent depend on for mobilising welfare rights. Clashes between an often-standardised welfare bureaucracy and the general chaotic and instable lives of the young persons in homelessness may result in lumping or avoidance if the individual person does not have sufficient resources, either individually or by drawing on intermediaries. Easy and continuous access to a strong social network thus appears to be a decisive factor for initiating and maintaining paths of mobilising welfare rights to exit homelessness. Without this network, the young persons may be lost in the complex welfare state system, leaving them in increasingly marginalised situations.

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11

Conclusion: Transformations of European Welfare States and Social Rights

Stine Piilgaard Porner Nielsen and Ole Hammerslev

Introduction

Conceptualising the 'welfare state' may be a challenging, if not impossible task (yet see, for example, Esping-Andersen, 1990). This anthology analyses European welfare state transformations and practices related to social rights. Across national differences and divides, welfare states, in different ways, distribute and allocate resources to persons considered eligible for state assistance. As welfare states differ, so, too, do their distribution schemes, level of social security and eligibility criteria for support. As an umbrella term, social rights refer to rights that are formulated to support individuals' social inclusion in society (European Social Charter, 1996). Social rights may be the right to assistance for unemployed persons to re-enter the labour market (ibid., Article 10), for persons in homelessness to find temporary shelter and adequate housing (ibid., part I) and for victims of crime to access protection and receive justice through welfare state institutions (Directive 2011/36/EU, Article 11). Social rights also encompass economic rights, for example, access to social security when individuals cannot provide for themselves (and their potential families), sickness benefits and early retirement pension.

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3_11

This anthology analyses individuals' access to these rights, including transformations of unemployed persons' access to social security and assistance to re-enter the labour market (Chapter 3), ex-prisoners' right to support to re-integrate into society (Chapter 4) and access to housing assistance for young persons in homelessness (Chapter 10). On EU level, an increasing political awareness of social rights as means to address social inequality is manifested in the European Pillar on Social Rights that outlines EU and Member State responsibility to support social inclusion through the transformation of social rights into practice. The process of transforming these rights from paper to practice is to a large extent of Member State concern, stressing the relevance of focusing on nation-state level when analysing welfare state transformations of social rights. Spurred by increasing social exclusion and inequality following financial crises (Aranguiz, 2022), and later COVID-19 (Valadas, 2021), EU emphasis has been put on supporting social inclusion through access to rights. With its Pillar on Social Rights, EU politically cemented its social focus. The Pillar may be read as a normative compass, indicating the political priorities of both the EU and its Member States. In some cases, European institutions are indeed central actors for transforming social rights into practice, as also illustrated in this book's Chapter 2 by Eule who analyses different interpretive approaches applied in the contexts of the Swiss Supreme Court and the European Court of Human Rights.

A common denominator across European welfare states is the regulation of social rights through framework law. Thus, it is relevant to take the character of framework law into consideration when analysing and discussing social rights in a welfare state context. Framework law outlines aims and purposes to categorise which social situations that are to be considered socially problematic and thereby potentially may be addressed through law (Westerman, 2018). By categorising social situations as social *problems*, law reflects normative understandings of social inclusion and equality which are of significance for interpreting individuals' social needs and eligibility for social support. Moreover, framework law delegates authority and, in some cases, outlines overall procedures whereby it structures a potential scope for different actors and different practices. Framework law has been appreciated for its inclusive character, emphasising the active involvement of citizens and its responsiveness as it, on paper, allows for solutions tailored to the individual person's social needs (Dalberg-Larsen, 1984). These features may, however, be challenged or questioned as existing research stresses that some groups in society, especially socially marginalised persons, are often not aware of or capable at actively engaging in welfare systemic processes of accessing social rights

(Nielsen and Hammerslev, 2018). As encounters and interactions, in a framework law context, are pivotal for assessing persons' social needs, individuals who are unable to engage in these practices may fall short in processes of realising their social rights unless support from social network or intermediaries is present to mitigate such shortcomings. With its delegation of authority, framework law potentially invites for multiple actors to enter the field of social rights. In a Danish welfare state context, as illustrated in Chapter 10, the responsibility to offer support to young persons experiencing homelessness rests primarily with the 98 municipalities, and the law emphasises that the municipalities are obliged to enter cooperation with both state and non-state actors to transfer this responsibility into practice. In this context, the process of transforming social rights into practice potentially involves not only the individual person who experiences homelessness and the municipality in which they reside but also non-state actors as private organisations, such as NGOs and other third sector initiatives. As framework law outlines aims and purposes rather than detailed processes, it offers room for discretionary practices, often guided by law's purpose as well as informed by factors such as organisational, political and economic priorities and normative understandings of addressing social needs. From this, it follows that both ordinary persons and welfare professionals may encounter varying procedures and interpretations that in different ways influence assessments of social needs and thus also the allocation of social rights. Despite these differences, similarities are identified as well across Danish municipalities. These concern welfare systemic standardisation of demands for documentation and active involvement by the individual persons, for instance that persons must meet welfare systemic demands for documentation to prove their social needs based on which their eligibility is assessed (Nielsen and Hammerslev, 2022). In addition, these documentation processes take place in interactions between the individual and welfare system, either facilitated online by the submitting of forms and papers or physically in encounters between persons and welfare professionals. Documentation and interaction are thus central for assessing social needs and eligibility without which allocation of social rights cannot take place.

Persons' access to social rights in European welfare states is influenced by structural as well as individual factors and by interactional dynamics between ordinary citizens in need for social support and welfare professionals who perform discretion. Of structural relevance is, for example, legal sources that outline which social problems that may be addressed and the criteria for persons' eligibility as well as the organisation of the welfare state and its cooperation with and dependence on other actors to provide social services.

Individual factors of relevance may be awareness of rights, knowledge of processes to invoke rights, language skills and a resourceful social network to offer support in these processes. For persons who experience problems with meeting welfare systemic demands, such individual aspects are often decisive for whether they recognise their situation as potentially legal and have adequate resources to mobilise their rights (Olesen and Hammerslev, 2023). Existing literature refers to 'state abdication' to describe the processes where the welfare state, in different areas, would traditionally offer support and help but has increasingly stepped down, and the space for practice has been taken over by NGOs and private actors (Bourdieu, 2016; Hammerslev, 2015; Sommerlad and Sanderson, 2013). In some cases, individuals' access to these actors are decisive for accessing social rights whereby the transformation of social rights appears to be increasingly arbitrary and contingent, shaped by social and professional relations and resources—own as well as others.

Though social law generally has the character of framework law in the European welfare states, it differs across Europe. In some countries and cases, there are more room for discretion for welfare professionals than in other (see, for example, de Winter's Chapter 6 and Hertogh's Chapter 9 on the harsh and punitive Dutch welfare state). As all other legislation, framework law is by no means a static phenomenon. Rather, it is dynamic and subjected to change. Welfare law outlines situations that may call for social support, such as homelessness and unemployment. It, too, categorises potential solutions to such problems, such as in a Danish context stressing the relevance of access to temporary stay as legal means to address homelessness. By textualising situations that can resolve welfare support and eligibility criteria, law reflects normative understandings in society related to, for instance, deservingness and social constructions of 'victims' and 'rights holders'. These social constructions may be interpreted as products of the political environment of the welfare states, and law contributes to the reproduction of these understandings as it through its regulation reflects negotiated knowledge on right and wrong behaviour, indirectly providing moral judgements on good and bad citizens, meaning those who deserve the help and support of the welfare state and those who do not.

In the following, we unfold the anthology's tripartite approach which is structured around, firstly, a macro level focus on state regulation, transformation and reconfiguration influencing the role of non-state actors. Secondly, we focus on a meso level which analyses the relevance of encounters between welfare professionals and individuals in need of welfare help for the latter's access to social rights. Thirdly, the micro level of legal mobilisation from a bottom-up perspective is examined, analysing the relevance of individual and

structural resources for processes of mobilising law to transform rights into practice.

A Three-level Perspective on Transformation of European Welfare States and Social Rights

The Macro Level of State Regulation

The anthology's first section, Chapters 2–4, focuses on state regulation, transformation hereof and on agents acting on behalf of the welfare states. In Chapter 2, Tobias Eule draws historical lines to the development of social rights in the European welfare states. He takes a starting point in the conceptualisation of deservingness to analyse and illustrate how deservingness has been and is constructed as means to rationalise welfare law. Deservingness thus becomes a filtering mechanism for assessing who is eligible for social rights. In addition, Eule identifies an individualisation turn in social rights regulation, stressing individual responsibility for social disintegration and exclusion which influences subjective and systemic constructions of deservingness. Eule argues that to understand welfare states' interpretation of deservingness and how the interpretation is applied to assess eligibility, the organisational context of the interpretive practices must be taken into consideration. He illustrates the relevance of the organisational context through the case of Beeler v. Switzerland where Mr. Beeler's social rights claim was first rejected by the Swiss Supreme Court on rather traditional paternalistic interpretive grounds. Mr. Beeler then brought the case before the European Court of Human Rights on grounds for discrimination and rights to family life. The grand chamber then rejected the ruling by the Swiss Supreme Court. Drawing lines to the above-mentioned common themes and tendencies, Eule's chapter manifests the significance of deservingness for constructing access to welfare rights, and it illustrates how legitimate knowledge is negotiated differently, depending on the context in question.

Inger-Johanne Sand's contribution in Chapter 3 examines the role of contemporary welfare law and the dilemmas facing the welfare state. She takes her starting point in the Norwegian welfare state and focuses on tendencies of labour market inclusion and 'work-line' policies. In her analyses, Sand argues that the strong focus in welfare state regulation on re-integrating unemployed persons into the labour market is sparked by discourses related to a 'sustainable welfare state' and a 'meaningful' life for the welfare state's citizens. The dilemma of the welfare state consists in, on the one hand, mitigating

increasing public expenditures caused by social service demands, while, on the other hand, respecting the individual's right to welfare support. Thus, there is a dilemma between 'macro-economic and labour market economic aspects of welfare rights' and the 'care-taking, ethical and social protection functions of welfare by political authorities and legislators'. The welfare state navigates in these dilemmas by discursively constructing labour market participation as 'meaningful'. This discourse reflects the ethical concern of the welfare state for the well-being of its citizens while it also allows for understandings related to citizens' contribution through active labour market participation. Thus, Sand's contribution illustrates how discursive changes may be sparked by dilemmas of general concern to all European welfare states, and how these discourses are permeating policies and legal regulation, thereby creating real effect for the citizens and their access to social rights.

Chapter 4 by Annette Olesen, Maija Helminen and Emy Bäcklin examines penal voluntary sector organisations' (PVSOs) challenges in providing social support to prisoners and ex-prisoners as means to facilitate processes of their re-integration into society post imprisonment. Following state reforms leading to cuts in public services, third sector actors such as the PVSOs play an increasingly important part in transforming social rights into practice. Thus, the chapter offers insights into the links between state reforms, reconfigurations of state and non-state actors and the provision of social rights. The authors draw comparisons between PVSOs in the Danish, Finnish and Swedish welfare states and offer insights into the welfare states' different organisation affecting these third sector actors' scope for practice. Despite national differences, the authors identify a common challenge facing the PVSOs in these three different national contexts on the basis of their so-called 'shadow state' position. This position indicates that the organisations are subjected to the state's agenda-setting of political priorities and regulations which affects their scope for practice. Though the PVSOs as third sector actors play a crucial role, the authors illustrate that, in practice, relations between PVSOs and state institutions may be challenged by 'disorganised co-operation', which negatively affect PVSOs' opportunities for transforming social rights pertaining to the principle of normalisation into practice. Moreover, though these third sector actors play a pivotal role in transforming state responsibility into practice, they generally rely on external funding which leaves them in a precarious economic state, negatively impacting their scope for practice.

The Meso Level of Welfare Professional-Citizen Encounters

In the second section of the anthology, the focus is on encounters between welfare professionals and citizens. The contributions constituting this section are Chapter 5 written by Pete Sanderson and Hilary Sommerlad, Chapter 6 written by Paulien de Winter and Chapter 7 written by Martin Joormann.

The chapter by Sanderson and Sommerlad contributes to the anthology by illustrating the significance of welfare state transformations for encounters between welfare professionals and citizens; encounters which aim to support citizens' access to law. The authors trace neo-liberal transformations in England and Wales seen in relation to welfare professionals' ability to provide services to citizens in need. Sanderson and Sommerlad zoom in on the welfare systemic context for encounters between legal aid providers and individuals who seek out legal advice. They compare data from four empirical studies conducted in England and Wales from mid-1990s to 2015 and examine the discursive construction of citizenship to analyse its relevance for citizens' access to law. The chapter illustrates how activist legal professionals use law to improve citizens' social well-being, for example, by calling upon local administrations' duty to provide support 'to get people what the government has said they're entitled to'. The chapter offers empirical examples to analyse the significance of encounters between legal aid providers and citizens for the latter's access to the rights they are entitled to. The encounters are pivotal for citizens' rights claiming and access to law. However, as the authors also illustrate, the working conditions of the legal aid providers are under pressure as a result of welfare systemic reforms and public expenditure cuts which negatively affect the encounters' potential for supporting citizens' access to law.

De Winter analyses the relevance of Dutch welfare professionals' perceptions of rules and regulations for their performance of discretion in encounters with citizens. The chapter thereby contributes to the anthology as it, for example, offers analytical insights into the link between welfare professionals' perceptions and practices, and how this link has real effect for citizens who in different ways interact and engage with the welfare professionals. As de Winter stresses, the welfare professionals are located in a 'paradoxical reality' following their obligation to treat citizens alike yet act responsively in individual cases. This reality constitutes a potential challenge between standardising and individualising welfare support. The chapter draws on empirical data from interviews with welfare professionals working at municipal agencies and employment insurance agencies with the purpose

of supporting unemployed persons' re-entry to the labour market and it illustrates differences in welfare professionals' perceptions, motivated by, for example, individual factors and organisational context. Concerning the former, the author argues that age and gender appear to be of significance for welfare professionals' perceptions and interpretations of rules and regulations, and related to the latter, organisations' approaches to law and enforcement seem to trickle down to the welfare professionals who internalise their organisation's approach. As exemplified in the chapter, welfare professionals' interpretations and perceptions influence their enforcement styles whereby perceptions and interpretations have real effect in encounters between welfare professionals and citizens.

Martin Joormann's chapter on Swedish judges' interpretation and decision-making processes related to asylum cases contributes to the anthology as it, for example, analyses the relevance of knowledge production for the outcome of asylum seekers' cases. The chapter draws on interviews with Swedish judges to examine how they assess who is eligible for asylum and who is not. A common factor of relevance for the respondents is the so-called country of origin information (COI) which outlines relevant information on asylum seekers' home country whereby the COI serves as producing knowledge on the state of stability of the given country and the safety of the individual asylum seeker. Joormann points to the fact that COIs are generally written up in and by actors representing refugee-receiving countries rather than in and by actors representing refugee-sending countries. Thus the knowledge produced in the COIs may be reflecting different epistemic realities, causing 'epistemic violence', as conceptualised by Spivak (see Chapter 7). The COIs are decisive elements in encounters between judges and asylum seekers as they form a written exchange of knowledge, however this knowledge is not provided by the asylum seekers themselves. As Joormann illustrates by drawing on respondents' accounts, the knowledge provided through COIs is sometimes considered incomplete or insufficient, for example due to language barriers, as a judge explains: 'we have to sit and … decide about people's, well not life and death, but sometimes actually, in another language than our mother tongue'. Joormann's analyses of the judges' stories bring insights into the functioning of migration bureaucracy in the Swedish welfare state and its real effect for and of professionals-individuals encounters.

The Micro Level of Mobilising Social Rights

This section consists of Chapters 8 to 10 and applies a bottom-up perspective to analyse and illustrate citizens' experiences of welfare encounters

and of mobilising social rights. In Chapter 8, Isabel Schoultz and Polina Smiragina-Ingelström examine the case of access to rights for victims of human trafficking in the context of the Swedish welfare state. Drawing on interviews with both welfare professionals and victims, the analysis illustrates challenges related to processes of victim identification and the relevance of these processes for accessing rights. The authors examine how law's formulation and categorisation as well as state institutions, such as the police, influence the subjective construction of 'victims' and ideas of 'ideal victims of crime'. These constructions may hinder access to rights for persons who do not perceive themselves as victims or are not perceived as victims by relevant welfare professionals. Categorisation and perception are thus crucial elements in legal mobilisation processes. Here, NGOs may play a decisive role because they, as expert and third sector actors, have resources available to identify and support their target group and work on other terms than state institutions. Victims may benefit from NGOs and other third sector actors' more flexible and responsive contexts whereas encounters with the police may have negative connotations, as a respondent accounts for: 'I had to talk about things I had forced myself to forget […] Interviews went on for hours, sometimes until I broke down'. The chapter thereby provides analytical insights into the relevance of law's categorisation and the welfare state set-up for individuals' ability to claim rights.

Chapter 9, written by Marc Hertogh, focuses on how welfare clients' perceptions of welfare professionals' understandings of law influence the clients' own practices. The chapter thereby contributes with insights into relational aspects between these welfare clients and professionals in regard to citizens' access to social rights, in this case social security and social welfare. Taking a starting point in the distribution of social security and social welfare in the Netherlands, Hertogh accounts for a so-called 'punitive turn' of the Dutch welfare state, reflected in strict rules and harsh sanctions. Drawing on empirical data from surveys on welfare clients' ideas of welfare professionals' perceptions of law, the chapter illustrates that these ideas have real effect for clients' behaviour and practices related to the claiming of social welfare and social security. From this, it follows that there are strong interactional and relational links between citizens and state officials that influence citizens' approaches to the mobilisation of rights. Drawing attention to these links contributes with analytical insights into both interactionist and individual elements of concern for the micro level of accessing rights. Moreover, with the chapter's unfolding of 'the punitive turn', it exemplifies the interlinkages between the macro level of state transformation, the meso level of

welfare professional-welfare client encounters and the micro level of clients' access to rights.

In Chapter 10, Stine Piilgaard Porner Nielsen and Ole Hammerslev focus on access to social rights for young persons experiencing homelessness in the Danish welfare state. The interviews with the young persons illustrate the diverse and subjective processes of mobilising law and the varying experiences of the young persons. Nielsen and Hammerslev identify common elements of relevance for the legal mobilisation processes: rights awareness, social network and sense of the welfare state bureaucracy. Young persons with a greater level of rights awareness, that is, an understanding of the law and sense of themselves as rights holder, with a supportive social network and with a sense of the welfare state as entry point for social support display what is referred to in the chapter as active agency. The authors draw an analytical distinction between active and passive agency, the first relating to the display of practice by the individual to pursue social rights whereas the latter refers to lack of the young persons' own actions to exit homelessness through welfare support. For some of the young persons, their social network may instead perform these practices, for example, by acting as intermediaries between the young persons and relevant welfare professionals. The chapter thereby contributes to the anthology with a micro level perspective on challenges and opportunities for the ability of socially marginalised citizens, in this case young persons in homelessness, to transform social rights into practice.

Across the diversity of the anthology's chapters, we identify common features in tendencies in transforming European welfare states and social rights. These common features concern state transformations and reconfigurations resulting from neo-liberal reforms that, in some cases, lead to state abdication and entry of third sector actors, changing political priorities reflected in 'punitive turns' where welfare states prioritise workfare over welfare, focusing increasingly on activation schemes and sanctions, often with the result of individualising social problems, such as unemployment and homelessness. In addition, common features concern the discursive construction of deservingness based on political priorities and formulation of legal sources, the production of legitimate knowledge following law's categorisation of eligibility and responsibility as well as structural and individual factors of relevance for citizens' opportunities of transforming welfare rights into practice.

Common Features in Transformations of European Welfare States and Social Rights

In this section, we unfold the above-mentioned common tendencies, themes and aspects as they appear in the analyses of the book's chapters.

Transforming and Reconfiguring the Welfare State

The European welfare states of today have undergone changes, following diverse political agendas of national as well as international character. The background for these changes has to a large extent been neo-liberal reforms following political priorities to slim down public sector expenses which have real effect for welfare professionals working in and with the public sector and for ordinary persons who are involved herewith. The result of these reforms is, too, reflected in changes in state expectations towards citizens, for example, illustrated in the increased workfare focus rather than welfare focus where access to social security is increasingly linked to activation schemes and reduced social security as means for including unemployed persons into the labour market. The reforms change focus on citizens' behaviour and shape scope for welfare professionals' practice where workfare politics may permeate interpretation and performance of discretion. This is illustrated in the chapters by de Winter, Hertogh and Sand. From different perspectives, the authors analyse workfare tendencies' relevance for the transformation of social rights. In Chapter 3, Sand examines the relevance of the Norwegian welfare state's political focus on workfare for regulation of access to social security, identifying an increased emphasis on individualisation of responsibility which leads to stricter demands of activation schemes targeted unemployed persons. These tendencies resonate with de Winter's and Hertogh's analyses on the Dutch welfare state, in which they illustrate how welfare professionals and clients perceive the stricter legislation. They suggest that the 'punitive turn of the Dutch welfare state', as Hertogh refers to, permeates the understandings of the welfare clients and influences their perception of legitimate practices in encounters with job centre professionals. On national level, neo-liberal reforms have caused reconfiguration of welfare states as state abdication has left room for third sector actors' increased entry into the field of welfare support. This is, for example, illustrated in Chapter 4's analysis of penal voluntary sector organisations' (PVSOs) challenges in transforming ex-prisoners' right to societal re-integration into practice in Denmark, Finland and Sweden. In a UK context, neo-liberal reforms have also caused changes for third sector initiatives, including voluntary organisations as illustrated in

Chapter 5 in which the authors argue that state transformations sparked by neo-liberal reforms trickle down to the encounters between welfare professionals and their clients, negatively affecting professionals' ability to perform adequate support to groups of citizens who need it the most. Chapter 8, too, stresses the relevance of third sector actors, typically NGOs, offering legal and social advice whereby they constitute platforms for trust-based relations to persons experiencing human trafficking. Such platforms are essential for these persons' processes of claiming rights to protection. European institutions may, too, be pivotal actors for citizens' access to rights, as illustrated in Chapter 2 which analyses how state figuration, political priorities and normative understandings have real effect for the ordinary persons involved.

Who Deserves Welfare Support?

Are universal rights a real possibility? As outlined in the anthology's Chapter 1, existing studies, especially in the field of socio-legal research, have for decades been concerned with the relevance and role of rights. Coined in a discourse of universality, social rights have an embedded universalist proclamation, as Eule points to in Chapter 2. Sand and Sanderson and Sommerlad, too, address the universal recognition of citizens and their entitlement to universal social rights in Chapters 3 and 5, respectively. However, both Eule and Sanderson and Sommerlad critically question the universality of social rights, arguing that there are limits to welfare universalism and that the universal character of social rights has to varying degrees been replaced by an increased focus on individualisation of problems and by means and merits testing approaches. This indicates a discursive transformation related to categorisations of deservingness and of the groups of persons who deserve to be allocated social rights. In a welfare state context, deservingness may be understood in a perspective of relativity and comparison where the fact that one is, for example, citizen, does not by default implicate access to welfare rights in one's respective welfare state. Instead, deservingness is constructed on the basis of welfare state discourses on social problems, social needs and eligibility, contributing to the assessment of citizens' entitlement to social rights. Actors' subjective construction of deservingness may, too, have real effect for access to social rights. These constructions are, for example, shaped by available information, as illustrated in Chapter 7, perceptions of eligibility, as outlined in Chapter 8 and understandings of the social situation at hand, as stressed in Chapter 10. Subjective constructions of deservingness are to a large extent dynamic processes, highly influenced by both individuals' own perceptions of their social situation and professionals' interpretations of the situations at

hand and their scope for practice to remedy social situations through the allocation of social rights.

Negotiating Legitimate Knowledge

Perceptions of legitimacy feed into processes of negotiating legitimate knowledge which may influence approaches to and practices in processes of transforming social rights into practice. A striking example of the relevance of negotiated legitimate knowledge is provided in Chapter 7 by Joormann who illustrates how country of origin information and information from asylum seekers provide knowledge, based on which judges negotiate asylum seekers' right to asylum. Processes of negotiating legitimate knowledge is influenced also by contextual factors as illustrated in Chapter 2 where knowledge is produced and applied to legitimate adjudications made in the Swiss Supreme Court and in the grand chamber of the European Court of Human Rights, respectively. Organisational context is as well of relevance to consider for understanding processes of negotiating legitimate knowledge, as it is reflected in Chapter 6 that illustrates how organisational practices and interpretations influence welfare professionals' knowledge negotiation related to legitimate practices. Legitimate knowledge is also constructed on the macro level of welfare states reforms and transformations, as illustrated in Chapters 3 and 5. On the micro level of individuals' access to social rights, processes of negotiating legitimate knowledge often take place between individuals and intermediaries, such as NGOs and other expert actors, as Chapters 8 and 10 outline.

Structural and Individual Factors

In various ways, structural and individual factors in the European welfare states are decisive for transforming social rights into practice. From a structural perspective, access to welfare institutions and to intermediaries, such as NGOs, is crucial for persons' access to support and help. Also, NGOs, legal aid offices and voluntary organisations may be considered platforms of structural relevance for bridging gaps between individuals and welfare state institutions as official entry points for social support. This is, for example, outlined in Chapter 4, Chapter 5 and Chapter 8. In addition, institutional options for support, such as shelters to offer temporary stay to persons experiencing homelessness may be considered structural factors of importance for transforming social rights into practice, as illustrated in Chapter 10.

Though access on institutional and structural level is pivotal, it is not in itself sufficient. Individual factors must be taken into consideration as well; factors such as persons' awareness of rights, their categorisation of their situation and perceptions of options for support. As illustrated in Chapters 2 and 10, individuals' understandings and perceptions of themselves as rights holders, generally sparked by rights awareness and senses of the welfare state, inform practices related to rights claiming. Yet, these processes may be highly demanding in regard to, for example, economic, educational and social resources. Easy access to intermediaries and experts may mitigate individuals' experiences of exhausting rights claiming processes, thereby increasing the likelihood of transforming their welfare rights into practice.

A Concluding Remark

As illustrated in the anthology's contributions, understanding European welfare states and social rights calls for analytical approaches that consider the interlinked character of welfare state organisation and law's formulation of welfare professionals' work context and citizens' processes of accessing social rights.

On a macro level, European welfare states face dilemmas related to state limitations and universalism, and state abdication may be considered a response to overcome these dilemmas. When the state retrieves from its generally traditional responsibilities, it allows for other players to enter the field. Here, third sector actors, such as voluntary organisations and NGOs, are potentially decisive for transforming individuals' social rights into practice, yet these actors operate on other terms than state institutions and often their work conditions are restricted due to precarious funding, limited resources available and/or poor coordination with pivotal state collaborators. In encounters between welfare professionals, be they, e.g. voluntary legal aid providers or state judges, understandings of eligibility and deservingness influence decision-making processes. Here, knowledge exchange and organisational approaches to interpretation of rules and regulations that permeate welfare professionals' work contexts influence perceptions of individuals' eligibility and deservingness. These aspects thus create real effect for the transformation of social rights into practice, stressing the relevance of analytically examining the meso level of welfare transformation and social rights. From a micro perspective, perceptions of eligibility and deservingness are as well of relevance as these inform subjective constructions of rights entitlements that are of significance for initiating legal mobilisation processes.

Access to supportive social networks may be particularly important for especially socially marginalised citizens' processes of mobilising social rights, and without intermediaries to help initiate and/or facilitate such processes, this group of citizens may be left in increasingly vulnerable situations.

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S. P. P. Nielsen and O. Hammerslev (eds.), *Transformations of European Welfare States and Social Rights*, Palgrave Socio-Legal Studies,
https://doi.org/10.1007/978-3-031-46637-3